IN THE SUPREME COURT OF FLORIDA

STEVEN EDWARD STEIN,

Appellant,

CASE NO. SC06-1505

v.

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

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PRELIMINARY STATEMENT

Appellant, STEVEN EDWARD STEIN, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a trial court's denial of a 3.851 post-conviction motion in a capital case following a bifurcated evidentiary hearing.

The direct appeal opinion reflects the following facts:

> Stein, Christmas, and Kyle White were roommates. Stein was employed as a cook at a Lem Turner Road Pizza Hut in Jacksonville, Florida. Christmas was unemployed, but was a previous employee of an Edgewood Avenue Pizza Hut in Jacksonville, Florida. White testified that, about a week before the murders, Stein and Christmas had a conversation about how to rob a Pizza Hut restaurant. During the conversation, Stein mentioned the Pizza Hut on Edgewood Avenue, and both Stein and Christmas stated that there could be no witnesses to the robbery. On the day of the murders, Christmas, Stein, Stein's girlfriend, and White were home together. About 9:30 p.m. Stein and Christmas left, taking with them Stein's .22 caliber rifle. They stated that they were going to see Christmas' father about selling him the rifle. They returned home around 11:30 to 11:45 p.m.
>
> The next morning, two employees of the Edgewood Avenue Pizza Hut, Dennis Saunders and Bobby Hood, were found shot to death at the and the sum of $980 was missing from the restaurant. The victims were shift supervisors of the restaurant and their bodies were found in the men's restroom. Bullet fragments and cartridge casings were recovered from the restroom area. Hood had suffered five gunshot wounds--four to the head and one to the chest. The medical examiner testified that the shots had been fired from four to six inches away and that Hood was sitting at the time he was shot. Saunders had suffered four gunshot wounds--one through the neck, one in the right shoulder, one in the chest, and one in the right thigh. The medical examiner testified that Saunders was sitting on the floor at the time the shots began and, given the position of the bullet wounds, that he was moving around during the shooting.

> Ronald Burroughs was an employee of the Edgewood Avenue Pizza Hut. He testified that on the night of the murders, he left the restaurant at 11:15 p.m. When he left, Hood and Saunders were still inside the restaurant and only two customers remained at the restaurant. Burroughs identified those two customers as Stein and Christmas. An unpaid guest check on a table in the restaurant contained a fingerprint belonging to Christmas. Three expended .22 caliber casings were found at the residence of Stein and Christmas. A ballistics expert testified that the casings found at the scene and the casings found at the residence were fired from the same firearm. Christmas's father testified that Stein and Christmas did not come to his house on the night of the murders and never bought a rifle from Stein. Stein confessed to the robbery and murders but did not identify the actual shooter.

See *Stein v. State*, 632 So.2d 1361, 1363 (Fla. 1994).

Stein was convicted of two counts of first-degree murder and one count of armed robbery. At the penalty phase, Stein's sister and girlfriend testified on his behalf. The jury recommended death for both murders by a ten-to-two vote. The trial judge found five aggravating circumstances: (1) previous conviction for a violent felony based on the contemporaneous murders of the two victims; (2) the homicides occurred during the commission of a robbery; (3) the homicides were committed to avoid arrest; (4) the homicides were cold, calculated, and premeditated; and (5) the homicides were heinous, atrocious, or cruel. Additionally, the trial judge found one statutory mitigating factor - no significant history of prior criminal activity. The trial judge sentenced Stein to death for the

murders and to life imprisonment for the armed robbery. *Stein*, 632 So.2d at 1364.

On appeal, Stein raised twelve claims: (1) the trial court erred in denying the motion to suppress Stein's statement obtained in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), because he repeatedly asserted his right to a lawyer; (2) the trial judge erred in allowing a suppression hearing to proceed in the absence of Stein's counsel; (3) the trial judge erred in failing to declare a mistrial after one witness referred to a "hit" list and a detective referred to the defendant as a "skin head"; (4) the trial judge erroneously found the aggravating circumstance of HAC because the deaths were nearly instantaneous;[1] (5) the trial judge erroneously found the aggravating circumstance of a previous conviction for a violent felony because the prior conviction was based on a contemporaneous conviction; (6) the trial judge improperly doubled when he found both the avoid arrest aggravator and the cold, calculated, and premeditated aggravator because these two aggravating factors were based on the same finding that the murders were committed to eliminate

[1] The Florida Supreme Court agreed with this claim, finding that the trial judge erroneously found that the murders were heinous, atrocious, or cruel and struck that aggravator but affirmed the death sentence, concluding that the trial judge properly imposed the death penalty given the four other aggravating factors present in this case. *Stein*, 632 So.2d at 1367.

witnesses; (7) the trial judge failed to find in mitigation that Christmas, rather than Stein, was the primary actor and triggerman and good character evidence from his sister and girlfriend; (8) the trial court erred in failing to *sua sponte* prohibit testimony that Christmas was carrying a concealed firearm because it amounted to non-statutory aggravation of a uncharged crime; (9) the trial court erred in overruling the objection to the prosecutor's reference to the victim as married with a child; (10) the trial court erred in instructing the jury on the HAC aggravator because the deaths were nearly instantaneous; (11) the trial court erred in overruling the objection to the prosecutor's reference to the defendant's normal behavior in the wake of the murders because it amounted to a lack of remorse; and (12) the HAC instruction was unconstitutionally vague in violation of *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).[2] The Florida Supreme Court affirmed the convictions and death sentences. *Stein v. State*, 632 So.2d 1361 (Fla. 1994).

Stein sought certiorari review in the United States Supreme Court, claiming the HAC jury instruction violated *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

[2] This is an *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) claim.

The United States Supreme Court denied certiorari on October 3, 1994. *Stein v. Florida*, 513 U.S. 834, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994).

Stein filed an amended post-conviction motion raising 25 claims on June 21, 1996. The State filed a response agreeing to an evidentiary hearing on several claims on July 30, 1998. The trial court ordered a *Huff* hearing regarding several claims on October 16, 1998.

On May 3, 2002, Stein filed a second amended post-conviction motion raising twelve claims: (1) ineffectiveness for failing to present mitigating evidence; (2) newly discovered evidence that the co-perpetrator, Marc Christmas, was the actual triggerman; (3) the trial court improperly delegated the task of preparing the sentencing order to prosecutor; (4) ineffectiveness for conceding to armed robbery in closing; (5) ineffectiveness for failing to present an intoxication defense; (6) prosecutorial comments; (7) Florida's death penalty scheme violates *Apprendi* and *Ring*; (8) CCP jury instruction; (9) HAC jury instruction; (10) the rule prohibiting attorney from interviewing jurors is unconstitutional; (11) a *Caldwell* violation; and (12) cumulative error. The State responded to the second amended motion on July 3, 2002. The State agreed to an evidentiary hearing on claims (1), (2), (3), (4), and (5),

which included the claim of the trial court improperly delegating task of preparing sentencing order to prosecutor.

On October 18, 2002, an evidentiary hearing regarding the improper delegation claim, *i.e.*, the *Patterson* claim, was conducted with Judge Moran presiding. The original judge, Judge Wiggins, testified at this evidentiary hearing. Judge Moran denied the claim. The case was returned to Judge Wiggins to rule on the remaining claims.

Stein filed a petition for writ of prohibition in the Florida Supreme Court on October 11, 2002. *Stein v. State*, SC02-2180. Stein sought the disqualification of Judge Wiggins, the original trial judge; Judge Moran, the chief judge who presided over an evidentiary hearing of one of the post-conviction claims and all the other judges of the Fourth Judicial Circuit in all further proceedings in this case. The Florida Supreme Court denied the writ on November 25, 2002.

Stein also filed an appeal of the *Patterson* claim which this Court denied without prejudice to raise the issue in this appeal. *Stein v. State*, SC02-2626.[3]

Stein also filed a *pro se* writ of prohibition seeking review of the trial court's order denying his request to represent himself during the postconviction proceedings. *Stein*

[3] Stein has not raised the *Patterson* claim in this appeal.

v. State, SC04-1037. This Court denied the writ on January 28, 2005.

The trial court, with the original judge, Judge Wiggins, presiding, held a second evidentiary hearing on the remaining four claims on February 13 and 14, 2006.

SUMMARY OF ARGUMENT

ISSUE I

Stein argues that conducting a bifurcated evidentiary hearing was error. The trial court held a bifurcated evidentiary hearing with Judge Moran presiding at the first evidentiary hearing regarding the authorship of the sentencing order and Judge Wiggins presiding at the second evidentiary hearing regarding the other claims. He asserts that because Judge Wiggins testified at the first evidentiary hearing with Judge Moran presiding, he became a witness in the case and, therefore, was disqualified from presiding at the second evidentiary hearing. While a judge may not be a witness in a case where he presides, Judge Wiggins was not a witness at the second evidentiary hearing over which he presided. Judge Moran presided over the first evidentiary hearing at which Judge Wiggins was a witness. There was no violation of the statute, rule, or canon. Judge Wiggins did not rule on his own credibility. Judge Wiggins was not called upon to assess his own credibility in determining the *Patterson* issue, Judge Moran did that. Judge Wiggins was not a witness at the second evidentiary hearing. Nor was there a jury at either evidentiary hearing for him to confer his seal of approval on one side in the eyes of. Bifurcation is a reasonable balance. Having the

original trial judge preside over the capital post-conviction proceedings is a "real advantage", in Justice Well's words, because he was the actual sentencer. Under the rule of necessity, Judge Wiggins should be allowed to hear the remaining claims regardless of the general prohibition. Thus, the original judge properly presided over the second evidentiary hearing.

ISSUE II

Stein asserts that his trial counsel was ineffective at the guilt phase for pursuing a jury pardon as a trial strategy and for conceding that this was a robbery gone bad. Stein also asserts that trial counsel was ineffective at the penalty phase for not presenting additional lay witness mitigation regarding his background. There was no ineffectiveness at the guilt phase. It is not deficient performance to pursue a jury pardon trial strategy. While not a recognized legal defense, seeking a jury pardon is a common strategy among the defense bar. If a trial tactic is widely employed by the defense bar, it cannot be deficient performance. Nor was there any prejudice from this trial strategy. Trial counsel was not ineffective for conceding that a robbery occurred. This concession matched Stein's own confession. Stein's confession, which basically admitted to a robbery gone bad, was introduced into evidence. Nor was there

any prejudice from the concession. Regardless of counsel's implied concession of felony murder, the State's evidence established that this was a conspiracy to commit premeditated murder.

There was no ineffectiveness at the penalty phase. Many of the additional lay witnesses' testimony presented at the evidentiary hearing was a double edged sword. These witnesses testified as to Stein's racist views in a case where one of the victims was African-American. Others testified to illegal drug use, which many jurors do not consider mitigating. Nor was there any prejudice. None of the additional lay witnesses testified to any significant mitigation that was omitted from the penalty phase. Hence, the trial court properly denied these claims of ineffectiveness following an evidentiary hearing.

ISSUE III

Stein contends that the co-perpetrator's life sentence is newly discovered evidence. The co-perpetrator, Marc Christmas, was originally sentenced to death by the trial court. On appeal, this Court reduced Christmas' sentence to life because it was a jury override situation. This issue is procedurally barred. The relative culpability of Stein and Christmas was determined by this Court in the Christmas direct appeal. Moreover, where one defendant is more culpable than the

codefendant, disparate treatment is permissible. Stein is the more culpable of the two because he was the actual triggerman. Collateral counsel is simply mistaken in his assertion that the trial court found Christmas to be equally or more culpable than Stein. The trial court specifically found in the Christmas sentencing order that "Stein shot both victims." This Court has repeatedly affirmed death sentences for the more culpable defendant where the less culpable co-defendant received a life sentence. So, Stein's death sentence is not disproportionate to Christmas' life sentence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISQUALIFY? (Restated)

Stein argues that conducting a bifurcated evidentiary hearing was error. The trial court held a bifurcated evidentiary hearing with Judge Moran presiding at the first evidentiary hearing regarding the authorship of the sentencing order and Judge Wiggins presiding at the second evidentiary hearing regarding the other claims. He asserts that because Judge Wiggins testified at the first evidentiary hearing with Judge Moran presiding, he became a witness in the case and, therefore, was disqualified from presiding at the second evidentiary hearing. While a judge may not be a witness in a case where he presides, Judge Wiggins was not a witness at the second evidentiary hearing over which he presided. Judge Moran presided over the first evidentiary hearing at which Judge Wiggins was a witness. There was no violation of the statute, rule, or Canon. Judge Wiggins did not rule on his own credibility. Judge Wiggins was not called upon to assess his own credibility in determining the *Patterson* issue, Judge Moran did that. Judge Wiggins was not a witness at the second evidentiary hearing. Nor was there a jury at either evidentiary hearing for him to confer his seal of approval on one side in the eyes of. Bifurcation is a reasonable balance. Having the

original trial judge preside over the capital post-conviction proceedings is a "real advantage", in Justice Well's words, because he was the actual sentencer. Under the rule of necessity, Judge Wiggins should be allowed to hear the remaining claims regardless of the general prohibition. Thus, the original judge properly presided over the second evidentiary hearing.

The trial court's ruling

Stein's post-conviction motion included a claim that the original trial judge, Judge Wiggins, improperly delegated the responsibility of preparing the sentencing order to the prosecutors. *Patterson v. State*, 513 So.2d 1257, 1261 (Fla. 1987)(condemning the practice of a trial judge delegating to the State the responsibility of preparing the sentencing order). The State agreed that an evidentiary hearing should be held on five claims including the *Patterson* claim. The trial court ordered an evidentiary hearing to be held on the five claims including the *Patterson* claim. Stein then filed a motion to disqualify Judge Wiggins because the judge would be a witness. The trial court granted the motion to disqualify regarding the *Patterson* claim but denied the motion as to the remaining four claims. In other words, the trial court bifurcated the post-

conviction proceedings. Judge Moran assigned the case to himself for the limited purpose of hearing the *Patterson* claim.

On October 18, 2002, an evidentiary hearing regarding the *Patterson* claim was conducted with Judge Moran presiding. Post-conviction counsel explained that the basis of their allegation was that there was an unsigned copy of the sentencing order in the State Attorney's files but no copy in defense attorney Jeff Morrow's files. Judge Moran explained that it was standard practice in the Circuit to have only one signed copy that was signed in open court when the sentence was pronounced with unsigned copies available to anybody that wants one. At the hearing, both prosecutors testified that they did not prepare the sentencing order. Counsel read a passage from the trial transcript at page 943 in which the trial court said: "Mr. Bateh, the Court will hand you the written sentence" and "Mr. Morrow, at this time the Court will hand you the written sentence that the court has just imposed." Judge Wiggins testified at the first evidentiary hearing. Judge Wiggins testified that he, not the prosecutor, prepared the sentencing order. Judge Wiggins testified that he did not request a proposed order from the State. Judge Wiggins also testified that there was no *ex parte* communications regarding the sentencing order. Post-conviction counsel presented no evidence refuting any of this testimony. Judge Moran expressed his

disapproval of filing a claim and a motion to disqualify the original trial judge based on such scant evidence. Judge Moran entered an order denying the *Patterson* claim, noting that there was no evidence presented at the hearing that the State prepared the sentencing order.

The original trial judge, Judge Wiggins, heard the four remaining claims at the second evidentiary hearing held on February 13 and 14, 2006.

The standard of review

The standard of review for a motion to disqualify is *de novo*. *Rodgers v. State*, 948 So.2d 655, 672 (Fla. 2006)(observing that the "question of whether a disqualification motion is legally sufficient is a question of law that we review *de novo*" citing *Barnhill v. State*, 834 So.2d 836, 843 (Fla. 2002)). Here, however, because the motion was granted in part, the real issue is whether the trial court abused its discretion in bifurcating the evidentiary hearing. So, the standard is abuse of discretion which requires that this Court conclude that no reasonable trial court would handle this unusual situation in this efficient manner. *Reynolds v. State*, 934 So.2d 1128, 1159 (Fla. 2006)(explaining that "under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable, ...

[and] discretion is abused only where no reasonable [person] would take the view adopted by the trial court.”).

Merits

The statute governing suggestion of disqualification, § 38.02, Florida Statutes, provides:

> In any cause in any of the courts of this state any party to said cause, or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such suggestions shall be filed in the cause within 30 days after the party filing the suggestion, or the party's attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived. If the truth of any suggestion appear from the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds of his or her disqualification, and declaring himself or herself to be disqualified in said cause. If the truth of any such suggestion does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the truth or falsity of such suggestion. If the judge finds that the suggestion is true, he or she shall forthwith enter an order reciting the ground of his or her disqualification and declaring himself or herself disqualified in the cause; if the judge finds that the suggestion is false, he or she shall forthwith enter

> the order so reciting and declaring himself or herself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

The statute governing the competency of certain persons as witnesses, § 90.607(1)(b), Florida Statutes, provides:

> the judge presiding at the trial of an action is not competent to testify as a witness in that trial. An objection is not necessary to preserve the point.

The rule of Judicial Administration governing the grounds for the disqualification of trial judges, rule 2.160(d), provides:

> A motion to disqualify shall show:
> (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or
>
> (2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.

The Canon of the Code of Judicial Conduct governing disqualification of a judge, Canon 3(E), provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, **or personal knowledge of disputed evidentiary facts concerning the proceeding**;
>
> (b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or **the judge has been a material witness concerning it**;

* * * *

Personal knowledge of disputed evidentiary facts means extrajudicial, so facts learned by a judge in his or her judicial capacity cannot be the basis for disqualification. *United States v. Bailey*, 175 F.3d 966, 969 (11th Cir 1999)(holding recusal was not required because whatever knowledge the judge gained was acquired in the course of a judicial proceeding); *Conkling v. Turner*, 138 F.3d 577, 592 (5th Cir. 1998)(explaining that a judge's personal knowledge of evidentiary facts means extrajudicial, so facts learned by a judge in his or her judicial capacity cannot be the basis for disqualification citing *Lac Du Flambeau Indians v. Stop Treaty Abuse-Wis.*, 991 F.2d 1249, 1255-56 (7th Cir. 1993). Here, Judge Wiggins had personal knowledge of who prepared the final sentencing order because he had done so as part of his judicial duties in this case. This is not extrajudicial - far from it - and therefore, is not a proper basis to disqualify the judge.

Stein also asserts that Judge Wiggins has some sort of personal bias or prejudice against him based on his *Patterson* claim. However, a *Patterson* claim does not involve any impropriety different from that of any other legal error. *Barwick v. State*, 660 So.2d 685, 692 (Fla. 1995)(concluding that a motion to disqualify may not be based on the fact that a trial judge makes an adverse ruling, citing *Jackson v. State*, 599 So.2d 103, 107 (Fla. 1992); *Gilliam v. State*, 582 So.2d 610, 611 (Fla. 1991), and *Tafero v. State*, 403 So.2d 355, 361 (Fla. 1981)). Stein is basically asserting that any time a trial court makes an erroneous ruling, that judge is subject to disqualification. If this is true, every retrial ordered by an appellate court after a finding of legal error would have to be conducted by a new judge. Erroneous rulings are not a proper basis for disqualification but this is especially true, where, as here, it has been determined by another judge that the asserted legal error did not occur. As Judge Moran found, Judge Wiggins did not improperly delegate his sentencing duties to the prosecutor and therefore, has no reason to be prejudiced against Stein regarding a legal error that never happened.[4]

The only real possible basis for the motion to disqualify is that Judge Wiggins was a witness at the evidentiary hearing

[4] Stein's post-conviction motion did not contain an allegation of *ex parte* communication, only an improper delegation argument. Motion at 26.

regarding the *Patterson* claim. The canon prohibits a judge from being a judge and a witness in the same proceeding or "matter in controversy". The matter in controversy about which Judge Wiggins testified was the *Patterson* claim. Judge Moran, not Judge Wiggins, presided at the hearing where Judge Wiggins was a witness.[5]

There was no violation of the statute, rule or canon. Judge Wiggins was not a witness at the second evidentiary hearing over which he presided. Judge Moran presided over the first evidentiary hearing at which Judge Wiggins was a witness.

The commentary to the equivalent federal rule of evidence prohibiting the judge from testifying in the case explains the problems when the judge becomes a witness and notes there are no satisfactory answers to questions which arise when the judge abandons the bench for the witness stand, such as: Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the

[5] The State notes that co-counsel Jeff Hazen also testified as a witness at the first evidentiary hearing. The State did not object to his further involvement at the second evidentiary hearing.

eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?[6]

None of these concerns are present. Judge Wiggins was not a witness at the second evidentiary hearing. Judge Wiggins did not rule on his own credibility. Judge Wiggins was not called upon to assess his or her own credibility in determining the *Patterson* issue, Judge Moran did that. Nor was Judge Wiggins called upon to assess his or her own credibility in determining the remaining issues at the second evidentiary hearing. His credibility was not at issue in the remaining issues explored at that second evidentiary hearing and he did not testify at the second evidentiary hearing. Nor was there a jury at either evidentiary hearing for him to confer his seal of approval on one side in the eyes of.

There is no controlling precedent from this Court on this issue. *State v. Riechmann*, 777 So.2d 342, 348 n.8 (Fla. 2000), in which this Court designated another judge to preside over the postconviction proceedings where the original trial judge was called as a witness with regard to the *ex parte* communication

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[6] The equivalent federal rules of Evidence governing the competency of Judge as Witness, rule 605, provides:

> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

and delegation of authority to the prosecutor to prepare the sentencing order claims, does not control. *Riechmann* did not involve bifurcated proceedings as in this case. *Riechmann* is also distinguishable because it was determined at the hearing that the trial judge in that case, had, indeed, had the prosecutor prepare a rough draft of the sentencing order. Here, by contrast, Judge Wiggins prepared his own sentencing order. He did not have the prosecutor write either a rough draft or the final sentencing order.

In *School Bd. of Indian River County v. Livaudais*, 720 So.2d 1175 (Fla. 4th DCA 1998), the Fourth District dismissed a petition for writ of prohibition based upon a motion to disqualify the original judge from conducting any further proceedings in the case. The School Board filed a motion to disqualify trial judge based upon a relationship between the judge and a witness. A senior judge was then assigned to try the case. After the trial, a motion for attorney's fees was set before the original trial judge. The School Board filed a petition for a writ of prohibition. The Fourth District dismissed the petition reasoning that because the case was tried before a different judge, the reason for recusal has been removed and because there was no allegation that the witness will testify in regard to any post-trial motions, the original judge was free to hear any post-trial motions. Thus, the Fourth

District concluded that the original trial judge could preside over further proceedings.

Moreover, even if viewed as a technical violation of the statutes, rules or canon, the rule of necessity should allow the original judge to preside over the post-conviction proceedings. According to the commentary to canon, by decisional law, the rule of necessity may override the norm of disqualification. Because the original trial judge is, in Justice Wells' words "a real advantage" to the case, as a matter of judicial efficiency, he should be permitted to preside over the postconviction proceedings regardless of the general prohibition in judges becoming witnesses. *Cardona v. State*, 826 So.2d 968, 982 (Fla. 2002)(Wells, J., dissenting)(noting the "real advantage in evaluating prejudice that the trial judge was the same as the postconviction judge."). The rule of necessity allows a judge who is otherwise disqualified to preside if there is no other judge to hear the matter. *United States v. Will*, 449 U.S. 200, 213-216, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980)(discussing the rule of necessity and noting that the rule of necessity has been consistently applied in this country in both state and federal courts); *People v. Superior Court*, 54 Cal.App.4th 407, 410, 62 Cal.Rptr.2d 721, 722 (Cal. App. 1997)(holding disqualification was not required of an appellate panel where the members belonged to the California Judge's

Association which had filed an amicus brief in the case because 90% of the states' judges belonged to the association, the rule of necessity applied). The original judge should be permitted to testify in the earlier evidentiary hearing and then resume his duties if the second judge determines that there is no merit to the judicial conduct issue.

Bifurcation of claims such as this *Patterson* claim is a reasonable balance. The original trial judge has a unique familiarity with the case that another judge who did not preside at the trial does not. *Cardona v. State*, 826 So.2d 968, 982 (Fla. 2002)(Wells, J., dissenting)(noting the "real advantage in evaluating prejudice that the trial judge was the same as the postconviction judge."); *Routly v. State*, 590 So.2d 397, 402 (Fla. 1991)(concluding that a finding by the trial court that the error had no effect on the sentence was "entitled to considerable weight" because the judge who presided over Routly's 3.850 motion was the same judge who presided over his trial and imposed the death sentence). The defendant has his day in court regarding the improper delegation claim in front of another judge. If there is merit to the *Patterson* claim, the defendant will receive a new sentencing hearing. If there is no merit to the *Patterson* claim, the remainder of the post-conviction proceedings should be conducted in front of the original trial judge. There is no reason to disqualify the

original trial judge where the underlying claim has been determined to be meritless by a second judge. *Palmer v. State*, 775 So. 2d 404 (Fla. 4th DCA 2000)(ordering another judge to hear a motion to disqualify the original judge but noting if the other judge determine that the appearance of counsel was a means to disqualify the original judge, the disqualification is waived).

If this Court holds that the original trial judge is to be prohibited from presiding at any further proceedings in the capital case that he or she tried, then any defendant can remove the original trial judge merely by raising a claim, such as a *Patterson* claim, where the original trial judge's conduct is at issue. Under rule 3.851 any claim that involves a factual dispute is suppose to have evidentiary development at an evidentiary hearing, so the original judge will have to testify regarding the claim where his conduct is at issue. Capital defendants will raise such claims, even though totally frivolous, as an automatic means of disqualifying the judge who sentenced them to death.

Petitioner's reliance on *Lewis v. State*, 565 S.E.2d 437 (Ga. 2002), is misplaced. Lewis was convicted of murders and other offenses and sentenced to death. Lewis filed a motion for new trial claiming that the judge responded to the jury's written questions without notifying defense counsel. Lewis also

filed a motion to disqualify the judge because she would have to testify regarding the jury's communications. The original trial judge recused herself as to the motion for new trial and the case was assigned to a different judge as to the issue of jury communications. The second judge held a hearing on the jury communication issue and the original trial judge testified at that hearing. She testified that she received no notes from the jury. The second judge ruled that no improper communications occurred. The original trial judge then ruled on the remaining claims in the motion for new trial. The Georgia Supreme Court held that the original trial judge was disqualified from further involvement in the case because she was a witness and remanded the case with directions that the motion for new trial be heard by a different judge. The Georgia Supreme Court reasoned that the appearance of impropriety cannot be eliminated merely by addressing these issues in a piecemeal fashion.

Lewis is distinguishable. In Georgia, the trial judge is not the actual sentencer, the jury is. Often, when appellate courts disapprove of partial disqualification, it is in the interest of judicial economy. There is normally no point in having two judges assigned to the same case. But this view of judicial economy depends on judges being fungible. While normally true, the original trial judge is not fungible in capital post-conviction proceedings in Florida. He has a unique

role as the actual sentencer in a capital case in Florida. So, judicial economy cuts the other way in such cases and demands that the original trial judge be retained as much as possible.

The Georgia Supreme Court's reasoning that the appearance of impropriety cannot be eliminated merely by addressing these issues in a piecemeal fashion is simplistic. The appearance of impropriety is, in fact, eliminated by having another judge determine the propriety of the original judge's conduct. Indeed, this situation differs little, if at all, from appellate review of the trial judge's rulings. If a case is remanded for a new trial by an appellate court because of legal error committed by the trial judge, the appellate courts do not order that the new trial be conducted in front of a new judge. The original trial judge conducts the new trial.

Moreover, the holding in *Lewis* makes little sense in light of Georgia's procedures for dealing with motions to disqualify. Georgia, like many states, holds hearings regarding claims of judicial bias. When a party files a motion to disqualify the judge claiming that the judge is biased, a second judge is assigned to hear the bias claim. The original judge may testify at the bias hearing. If the second judge determines that there is no merit to the claim, the original judge, who may have testified at the bias hearing, is reassigned to try the case. Ga. Uniform Superior Court Rule 25.3 & 25.4. See also *State v.*

Frye, 794 S.W.2d 692, 699 (Mo. App. 1990)(noting that if the challenged judge is to testify at the hearing on the motion to disqualify, a disinterested judge must hear the issue).

Harmless Error

Any potential violation of the rule was harmless. While a true constitutional judicial bias claim is not subject to harmless error analysis, a claim based merely on appearance of impropriety can be harmless. *Cf. Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363 (7th Cir. 1994)(concluding that appearance of impropriety by presiding judge was not equivalent of due process violation); *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1389 (7th Cir.1994)(Easterbrook, J., concurring)(observing that "'Appearance' problems lurk everywhere, for they are in the eye of the beholder."). Any other judge would have denied the remaining claims. There is little merit to the claims of ineffectiveness at the guilt or penalty phase. Any judge would also have rejected the claim of disparate sentencing between the two co-perpetrators. The facts regarding the relative culpability issue does not depend on any testimony from the evidentiary hearing. The facts relied on by collateral counsel are the respective sentencing orders and the respective jury recommendations. The sentencing orders were

written years prior to the evidentiary hearing and jury recommendations occurred years prior to the evidentiary hearing as well. Moreover, the relative culpability issue is reviewed *de novo* by this Court. Thus, a failure to have another judge preside over the remaining claims at the evidentiary hearing was harmless.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY REJECTED THE CLAIM OF INEFFECTIVENESS DURING THE GUILT AND PENALTY PHASE? (Restated)

Stein asserts that his trial counsel was ineffective at the guilt phase for pursuing a jury pardon as a trial strategy and for conceding that this was a robbery gone bad. Stein also asserts that trial counsel was ineffective at the penalty phase for not presenting additional lay witness mitigation regarding his background. There was no ineffectiveness at the guilt phase. It is not deficient performance to pursue a jury pardon trial strategy. While not a recognized legal defense, seeking a jury pardon is a common strategy among the defense bar. If a trial tactic is widely employed by the defense bar, it cannot be deficient performance. Nor was there any prejudice from this trial strategy. Trial counsel was not ineffective for conceding that a robbery occurred. This concession matched Stein's own confession. Stein's confession, which basically admitted to a robbery gone bad, was introduced into evidence. Nor was there any prejudice from the concession. Regardless of counsel's implied concession of felony murder, the State's evidence established that this was a conspiracy to commit premeditated murder.

There was no ineffectiveness at the penalty phase. Many of the additional lay witnesses' testimony presented at the

evidentiary hearing was a double edged sword. These witnesses testified as to Stein's racist views in a case where one of the victims was African-American. Others testified to illegal drug use, which many jurors do not consider mitigating. Nor was there any prejudice. None of the additional lay witnesses testified to any significant mitigation that was omitted from the penalty phase. Hence, the trial court properly denied these claims of ineffectiveness following an evidentiary hearing.

Standard of review

The standard of review of claims of ineffective assistance of counsel for the deficiency and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) is *de novo*. However, this Court defers to the trial court's findings of fact regarding the credibility of witnesses and the weight assigned to the evidence in a case where an evidentiary hearing was held regarding the claim of ineffectiveness. *Preston v. State*, 2007 WL 1556649, *8 (Fla. May 31, 2007); See also *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999)).

Ineffective Assistance of Counsel

As this Court explained in *Preston v. State*, 2007 WL 1556649, *9 (Fla. May 31, 2007), to establish a claim that

defense counsel was ineffective, a defendant must prove two elements: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. In order to establish deficient performance under *Strickland*, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." In order to establish the prejudice prong under Strickland, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Failure to establish either prong results in a denial of the claim. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct

the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

The Eleventh Circuit, in an *en banc* decision, discussed the performance prong of *Strickland*. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000)(en banc). The *Chandler* Court noted that the cases in which habeas petitioners can properly prevail are few and far between. The standard for counsel's performance is reasonableness under prevailing professional norms. The purpose of ineffectiveness review is not to grade counsel's performance; rather, the purpose is to determine whether the adversarial process at trial, in fact, worked adequately. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. Counsel does not enjoy the benefit of unlimited time and resources. Every counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial. Thus, no absolute duty exists to investigate particular facts or a certain line of defense. And counsel need not always investigate before pursuing or not pursuing a line of

defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. For example, counsel's reliance on particular lines of defense to the exclusion of others--whether or not he investigated those other defenses-- is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable. Because the reasonableness of counsel's acts (including what investigations are reasonable) depends critically upon information supplied by the petitioner or the petitioner's own statements or actions, evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. Counsel is not required to present every non-frivolous defense; nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Considering the realities of the courtroom, more is not always better. Stacking defenses can hurt a case. Good advocacy requires winnowing out some arguments, witnesses, evidence, and so on, to stress others. No absolute duty exists to introduce mitigating or character evidence. The reasonableness of a counsel's performance is an objective inquiry. Because the standard is an objective one, that trial counsel admits his performance was deficient matters

little. When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger. Even the very best lawyer could have a bad day. No one's conduct is above the reasonableness inquiry. Just as we know that an inexperienced lawyer can be competent, so we recognize that an experienced lawyer may, on occasion, act incompetently. However, experience is due some respect. No absolute rules dictate what is reasonable performance for lawyers. The law must allow for bold and for innovative approaches by trial lawyers. And, the Sixth Amendment is not meant to improve the quality of legal representation, but simply to ensure that criminal defendants receive a fair trial. These principles guide the courts on the question of reasonableness, the touchstone of a lawyer's performance under the Constitution. *Chandler*, 218 F.3d at 1312-1319.

At the evidentiary hearing, defense counsel, who represented Stein, Mr. Jeff Morrow, testified as to his background and experience. (PC Vol. I 10). He has been an attorney since 1982. (PC Vol. I 10). He worked for four years as an Assistant Public Defender. (PC Vol. I 59). He had extensive trial experience while working at the Public Defender’s office including a first degree murder trial. (PC Vol. I 59,61). He handled numerous second degree murder cases

while with the PD's office. (PC Vol. I 61). He also saw or sat second chair on a number of capital cases tried by Alan Chipperfield, Bill White and Lewis Buzzell while with the PD's office. (PC Vol. I 62). He then went into private practice. (PC Vol. I 60). He and Ray David left the PD's office and opened their own private firm. (PC Vol. I 60). He has been in private practice from 1985 until now. (PC Vol. I 60). He has defended a total of approximately 10-20 first degree murder cases. (PC. Vol. I 64). He has also handled a number of capital cases at the appellate level in the Florida Supreme Court. (PC. Vol. I 64-65). Mr. Morrow has attended numerous death penalty seminars for CLE credit. (PC. Vol. I 65). He attended the Life over Death seminar prior to Stein's penalty phase. (PC. Vol. I 32,65).

The trial court's ruling

The trial court rejected these claims of ineffectiveness, reasoning:

> **Defendant's Claim Five**
>
> In ground five, the Defendant claims he was denied effective assistance of counsel at the guilt phase of his trial. The Defendant sets out several claims of ineffectiveness under this ground.
> In ground five construed subclaim one, the Defendant claims counsel failed to effectively challenge Kyle White's credibility, discover and utilize mitigating evidence, or otherwise show the negative and undue influence that White had on the Defendant. The Defendant avers counsel should have shown that: 1)

White was the mastermind behind the robberies; 2) White had an undue influence over the Defendant; 3) White had a hatred for blacks and allegedly was fired from his job at Pizza Hut for making racial slurs; and 4) White recruited the Defendant in Phoenix and created the White Majority League, a white supremacy organization.

While the Defendant claims counsel should have done the listed things, the Defendant fails to set out a means by which counsel could have done such. Further, Mr. Morrow testified at the evidentiary hearing that he worked very hard to keep out evidence of the Defendant's racist views as he did not want the issue of a hate crime to come up in the Defendant's trial. (PC Vol. I 50, 68-69, 71). Mr. Morrow testified that there was evidence that the Defendant was "a skinhead, [and] a white supremacist," including the kinds of tattoos on the on the Defendant's body, and that one of the victims was black man. (PC Vol. I 68, 70). Mr. Morrow testified that if the evidence regarding the Defendant's racist views did come out during the trial, then he would have no chance of "winning." (PC Vol. I 68-69).

Initially, this Court specifically finds that Mr. Morrow's testimony was both more credible and more persuasive than the Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). Furthermore, this Court finds that Mr. Morrow's decision to keep out any evidence that the Defendant was a member of, or associated with, a white supremacy organization or skinheads, was a tactical decision made by counsel with the best interests of the Defendant in mind. In deciding on that particular trial strategy, counsel's testimony was clear that he considered the fact that one of the victims was a black man and how evidence of the Defendant's racist views would be received by the jury. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So.2d 1044 (Fla. 1982); Gonzalez v. State, 579 So.2d 145, 146 (Fla. 3rd DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.")

In ground five construed subclaim two, the Defendant makes several conclusory claims of counsel's ineffectiveness. (Defendant's Amended Motion at 46 #7-8). This Court finds that the Defendant's claims as stated are conclusory and insufficiently pled.

Parker, 904 So.2d at 375; see Strickland, 466 U.S. 668.

In ground five construed subclaim three and ground four subclaim one of the Defendant's Second Amended Motion, the Defendant claims counsel rendered ineffective assistance and that his constitutional rights were violated when his counsel conceded his guilt and premeditation in closing argument without his consent. The Defendant cites to Nixon v. State, 658 So.2d 618, 624 (Fla. 2000), to support his contention that without evidence showing the Defendant consented to the trial strategy, a claim of improper concession of guilt must prevail.

First, this Court notes that the United States Supreme Court has addressed the issue of whether counsel's failure to obtain a client's express consent to a strategy of conceding guilt in a capital case should automatically render counsel's performance deficient. Florida v. Nixon, 543 U.S. 175 (2004). The United States Supreme Court answered the question as follows:

> To summarize, in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. . . . [I]f counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the Strickland standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Id. at 192. Accordingly, "in order to obtain relief based on ineffective assistance of counsel for conceding guilt without the defendant's consent, the defendant must demonstrate that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance as required under Strickland." Nixon v. State, ___ So.2d ___, 2006 WL 1027135 at *4 (Fla. April 20, 2006) (citations omitted).

A review of the record indicates that while counsel may have conceded the Defendant's guilt as to the robbery, counsel did not concede the Defendant's guilt as to either of the murders as contended by the Defendant, nor did counsel conceded that death was appropriate. To the contrary, counsel argued that the Defendant's guilt as to the murders was subject to debate and made the argument that the co-defendant, Christmas, was the actual trigger man.

Further, during the evidentiary hearing, Mr. Morrow testified concerning this issue. Mr. Morrow testified that he felt then, and still fells now, that the best strategy for the Defendant, who confessed to the armed robbery, was to concede that the Defendant was at the armed robbery, but argue that the Defendant did not shoot the victims. (PC Vol. I 49). Mr. Morrow testified that, prior to trial, he discussed with the Defendant, the strategy of conceding guilt to the armed robbery and seeking a jury pardon. (PC Vol. I 41-42, 43-48). Mr. Morrow testified that he informed the Defendant that, under the law, if the Defendant was found guilty of armed robbery he would be guilty of felony murder and eligible for the death penalty. (PC Vol. I 38). Mr. Morrow testified that after discussing all of this with the Defendant, the Defendant agreed with the strategy. (PC Vol. I 39, 43-48). Specifically, Mr. Morrow testified that, several times during the discussion on jury pardons and conceding the Defendant committed the armed robbery, the Defendant answered "yes, you're right." (PC Vol. I 47). Mr. Morrow testified that it is not automatic that by conceding the Defendant's guilt to the armed robbery, that the jury will find the Defendant guilty of felony murder. (PC Vol. I 45-46). For example, the jury could pardon the Defendant if the jury did not believe he was the shooter and find him guilty of second degree murder, manslaughter, or some other lessor included offense. (PC Vol. I 45-46). Mr. Morrow testified that because the Defendant had confessed to the armed robbery and because the other evidence in the case was so strong, conceding the Defendant committed the armed robbery was the best chance they had to keep the Defendant from getting the death penalty. (PC Vol. I 47). The only other option for the defense was to "stonewall" the State and make them prove every element of the crime and hope that they did not, but then the Defendant would lose on the jury pardon issue. (PC Vol. I 48).

This Court specifically finds that Mr. Morrow's testimony was both more credible and more persuasive than the Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). Furthermore, this Court finds that Mr. Morrow's actions in conceding that the Defendant committed the armed robbery was a tactical decision made by counsel with the best interests of the Defendant in mind and with the Defendant's consent. Counsel's testimony was clear

that he considered the Defendant's confession to the crime of armed robbery as well as the other strong evidence in the case in deciding on that particular trial strategy. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Florida v. Nixon, 543 U.S. 175 (2004) (finding that counsel may, after reviewing the evidence in a case, reasonably decide to focus on the trial's penalty phase); Songer v. State, 419 So.2d 1044 (Fla. 1982); Gonzalez v. State, 579 So.2d 145, 146 (Fla. 3rd DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel."). Further, because counsel discussed the strategy with the Defendant prior to trial, and the Defendant agreed with the strategy, the Defendant is not entitled to relief under Nixon.

Defendant's Claim Six

In ground six and ground one of the Defendant's Second Amended Motion, the Defendant asserts that he was denied a full adversarial testing at the penalty phase due to counsel's failure to adequately investigate, prepare, and present mitigation. The Defendant concedes that counsel called two witnesses who testified to the positive attributes of the Defendant at the penalty phase; the Defendant's sister, Sandra Griffin Bates, and the Defendant's girlfriend, Christine Moss. However, the Defendant avers that this was insufficient. The Defendant claims counsel should have investigated several witnesses and contends had counsel sought additional funds and adequately investigated the case, additional mitigation could have been presented. First, the Defendant avers counsel failed to call Dr. Krop as a witness to present statutory and non-statutory mitigation. The Defendant states that counsel's failure to present mental health mitigation is "the most glaring," instance of ineffectiveness. (Defendant's Amended Motion at 52). Collateral counsel stated at the evidentiary hearing that they specifically did not make a claim regarding the statutory mental health mitigators or a claim that counsel should have called any kind of mental health experts. (PC Vol. I 71). Accordingly, this Court finds that the Defendant has voluntarily withdrawn this claim.

Second, the Defendant lists several people in his Second Amended Motion that he feels counsel should

have located and presented as mitigation: Mike Roinestad, Shari Roinestad, Rob Backer,Eric Troudt, Jon Atrium, and Shanda,[7] and the Defendant's "readily-accessible" family members. Collateral counsel also introduced the Defendant's adoption records and transcript from the Phoenix Institute of Technology at the evidentiary hearing. The Defendant contends that his trial counsel failed to investigate and prepare mitigation evidence in five mean areas: 1) the Defendant's teenage mother's lack of pre-natal care; 2) the Defendant's disengaged adoptive parents; 3) the Defendant's "marginalized" teenage years, including substance abuse; 4) his adoptive parents poor health; and 5) an automobile accident in which a friend died and the Defendant sustained injuries.

During the evidentiary hearing held on the instant case, Mr. Morrow testified concerning these issues. Mr. Morrow testified that his strategy was to try and save the Defendant's life by humanizing him to the jury and by arguing that Christmas, not the Defendant, killed the two people. (PC Vol. I 131). Mr. Morrow testified that he hired an investigator whose job was to locate witnesses that could assist the Defendant at the penalty phase. (PC Vol. I 18, 93-94). Mr. Morrow testified that he asked the Defendant about mitigation he knew about in his background and possible witnesses they could call on his behalf. (PC Vol. I 65-67). Mr. Morrow testified, that over his advice, the Defendant refused to let him call his parents as witnesses at the penalty phase. (PC Vol. I 23, 66). Mr. Morrow testified that both the Defendant and his sister informed counsel that the Defendant's parents did not want to get involved in the Defendant's case. (PC Vol. I 66). Mr. Morrow testified that he tried to find a way to present the Defendant's parents even though the Defendant objected, but he found federal

[7] The Defendant does not provide a full name for his ex-wife, and only refers to her as "Shanda," in his Motion. This Court finds is curious that not only can the Defendant not provide a full name for his ex-wife, but has repeatedly called her the wrong name throughout his Motion. The Defendant's ex-wife testified at the evidentiary hearing that her name is "Elaine Johnson Mann," and said collateral counsel could call her Shandra. (PC Vol. I 144). In the Defendant's written closing arguments he calls her Shandra for the first time. (Page 6).

caselaw that stated if a defendant does not want to call his parents as witnesses then it is "his prerogative." (PC Vol. I 18).

Mr. Morrow testified that the Defendant did give him several names of friends, which the investigator attempted to contact. (PC Vol. I 66). One of the witnesses listed by the Defendant, Kyle White, was hostile towards the Defendant and was actually a witness against the Defendant at trial. (PC Vol. I 67). Many of the friends listed by the Defendant could not be located. (PC Vol. I 70). Others that were located appeared to be white supremacists. (PC Vol. I 70-71). Mr. Morrow testified that, after consulted with the investigator, he determined that none of the individuals they were able to locate would have been helpful to the Defendant. (PC Vol. I 93-94). Mr. Morrow testified that he would have called the witnesses if he felt they would have been helpful. (PC Vol. I 94).

Mr. Morrow testified he worked very hard to keep out evidence of the Defendant's racist views as he did not want the issue of hate crime to come up in the Defendant's trial. (PC Vol. I 50, 68-69, 71). Mr. Morrow testified that there as evidence that the Defendant was "a skinhead, a white supremacist," including tattoos on the Defendant's body, and one of the victims was a black man. (PC Vol. I 68, 70). Mr. Morrow testified that if the evidence regarding the Defendant's racist views did come out during the trial, then he would have no chance of "winning." (PC Vol. I 68-69). As to the Defendant's drug abuse as a possible mitigator, Mr. Morrow testified that he did not feel that this was a good mitigator for the Defendant and did not want evidence of past drug abuse to be presented. (PC Vol. I 88-89). Mr. Morrow testified that while drug abuse may be used in some cases in mitigation, he felt that with the jury in the Defendant's case, the jury would have viewed the Defendant in a negative light instead of finding it as a mitigating circumstances. (PC Vol. I 90).

Mr. Morrow testified that neither he nor the investigator actually went to Phoenix, the Defendant's hometown. (PC Vol. I 34-35). Mr. Morrow testified, that in hindsight, he probably should have gone to Phoenix himself to attempt to locate mitigation witnesses. (PC Vol. I 34-35). Mr. Morrow also testified that, in preparation for the penalty phase, he hired Dr. Krop to examine the Defendant for

potential mental mitigation. (PC Vol. I 71-73). Mr. Morrow did not call Dr. Krop as a witness as Dr. Krop indicated, after examining the Defendant, he had nothing to offer in the form of mitigation. (PC Vol. I 73). Mr. Morrow further testified that he requested and received the Defendant's records from the Phoenix Institute of Technology. (PC Vol. I 18-19, 24-25, 82). Mr. Morrow testified that he had no specific memories regarding the documents he received from the Phoenix Institute or whether he introduced the documents as evidence during the penalty phase. (PC Vol. I 26). Mr. Morrow testified that he was very concerned because he could not find much in way of mitigation evidence. (PC Vol. I 33-34).

Mr. Morrow presented the Defendant's girlfriend at the time, Christine Moss, and the Defendant's sister, Sandra Griffin, in the penalty phase as mitigation witnesses. (PC Vol. I 36). Mr. Morrow testified that he contacted Ms. Griffin months prior to the penalty phase. (PC Vol. I 37). Mr. Morrow testified he spoke with Ms. Griffin on the telephone on several occasions to discuss the Defendant's background and prepare her for her testimony at the penalty phase. (PC Vol. I 18, 36-37).

This Court notes that of the six named mitigation witnesses listed in Defendant's Second Amended Motion, only three of those witnesses were actually called to testify at the evidentiary hearing: Shandra Elaine Johnson Mann, Shari Roinestad, and Mike Roinestad. Only one of the Defendant's "readily-accessible" family members was called at the evidentiary hearing, the Defendant's sister Sandra Griffin Bates. At the evidentiary hearing, collateral counsel also presented the testimony of Donna Nolz and Phillip Bacha.

Sandra Griffin Bates

Collateral counsel presented the Defendant's sister, Sandra Griffin Bates, as a mitigation witness. She did not remember Stein's counsel preparing her for her penalty phase testimony, but she did know what mitigation was when she testified. (PC Vol. I 118, 120). Ms. Bates testified that both she and the Defendant were adopted by parents who opened their hearts to them. (PC Vol. I 106, 109-110). The only thing Ms. Bates knew about the Defendant's adoption was that he lived in an orphanage until he was adopted at eight months. (PC Vol. I 110). Ms. Bates' knowledge of the Defendant's birth parents was limited to the fact that the Defendant's birth mother was

young and just happened to be in the area of where the Stein family lived when she went into labor. (PC Vol. I 110). In 1977, when the Defendant was nine years old, they moved to Phoenix, Arizona, due to her mother's health. (PC Vol. I 107-108). Ms. Bates got married when she was eighteen and moved to Guam in 1978 for two years. (PC Vol. I 113). She and the Defendant wrote letters back and forth during this time. (PC Vol. I 113). She remembers the Defendant being in a bad accident and being hospitalized on June 14, but could not remember a year. (PC Vol. I 115). The Defendant fractured his jaw in the accident and had to have it wired shut, and one of the passengers died. (PC Vol. I 115). Ms. Bates testified that the Defendant seemed heartbroken that one of the passengers had died as it made him realize his own mortality. (PC Vol. I 116). When asked by collateral counsel, Ms. Bates said she would have, to the best of her ability, given the same answers at the penalty phase if she had been asked the same questions, because most of the information she knew at that time. (PC Vol. I 120).

On cross-examination, Ms. Bates testified that the family was rich in love and emotional support. (PC Vol. I 121). Her parents' marriage was long and they were devoted to each other. (PC Vol. I 123). Ms. Bates testified that the Defendant got along very well with her and their parents when he was growing up in Maywood, New Jersey. (PC Vol. I 126-127). She testified that the Defendant was "very smart." (PC Vol. I 126). She did not recall the Defendant being arrested or convicted for attempted burglary nor did she recall the Defendant being arrest [sic] for stealing from a business. (PC Vol. I 129).

Donna Nolz

Donna Nolz, who went to elementary school with the Defendant in Phoenix, testified at the evidentiary hearing. (PC Vol. I 133). They were in the same grade but never in the same class. (PC Vol. I 134). Ms. Nolz testified the Defendant was a quiet, laid back person as a child who did not pick fights. (PC Vol. I 134, 136-137). The Defendant did not attend school regularly around the seventh or eighth grade, not because he was sick, but because, as the Defendant told her, he "just didn't feel like going to school." (PC Vol. I 135). The other kids in school would tease the Defendant about being an albino because he was so pale. (PC Vol. I 136, 137, 142-143). It was hard for

Ms. Nolz to recall anything else as they "had not encountered each other that much." (PC Vol. I 136). Ms. Nolz testified that no one came out to Phoenix to talk to her about the Defendant, but she admitted that they had lost contact since high school. (PC Vol. I 138). She would have been glad to testify if contacted and probably would have been able to recall more about the Defendant. (PC Vol. I 139).

On cross-examination, Ms. Nolz testified that she and the Defendant lost contact around freshman year of high school and that she knew the Defendant from about the 4th through the 8th grade. (PC Vol. I 139-140). She described the Defendant as a bright kid who knew right from wrong. (PC Vol. I 142). She did not know that the Defendant had an order sister and never met the Defendant's parents. (PC Vol. I 141). Ms. Nolz testified that the Defendant was not picked on in school, just occasionally teased. (PC Vol. I 143). Ms. Nolz knew nothing about the Defendant's life after age 15. (PC Vol. I 140).

"Shandra" Elaine Johnson Mann

"Shandra" Elaine Johnson Mann, who was the Defendant's teenage wife and the mother of his child, testified at the evidentiary hearing. (PC Vol. I 144-145). Ms. Mann testified at the evidentiary hearing that her name is "Elaine Johnson Mann," but said collateral counsel could call her Shandra. (PC Vol. I 144). She and the Defendant met when a friend of her brought her over to the Defendant's parent's home when she was 15 years old. (PC Vol. I 145). The Defendant was still recovering from the car accident in which the passenger was killed. (PC Vol. I 145). The Defendant's jaw was wired shut and he had a broken collar bone. (PC Vol. I 146). She testified to the lingering affects of the wreck she noticed in the Defendant, including recklessness, scars, and a lot of pain. (PC Vol. I 153). She testified that she liked the fact that the Defendant was "very smart," "very reckless," and "did not really care about consequences." (PC Vol. I 147, 152, 153, 157). She moved into the Defendant's parent's house because the Defendant's parents were ill and elderly and did not care what they did. (PC Vol. I 147-148).

Ms. Mann and the Defendant got married, and she found out she was pregnant at seventeen. (PC Vol. I 149-150). At first, she wanted to keep the baby but eventually told the Defendant that she was going to give the baby up for adoption. (PC Vol. I 148). The

Defendant was upset and wanted to keep the child. (PC Vol. I 148). The Defendant was opposed to adoption because he had been adopted himself which caused him pain. (PC Vol. I 148-149). The Defendant was devastated by her decision which went against everything he believed. (PC Vol. I 151). The Defendant "as a child of adoption" had been lonely and felt no bond with his parents and did not want to do that to his child. (PC Vol. I 151-152). Ms. Mann moved to another state and gave the child up for adoption. (PC Vol. I 150). Ms. Mann and the Defendant were divorced because of her decision to give their child up for adoption. (PC Vol. I 152). No one contacted her to discuss the Defendant or testify at the penalty phase. (PC Vol. I 153).

On cross-examination, Ms. Mann testified that she and the Defendant were together for 1½ to 2 years and they had little to no contact after that. (PC Vol. I 154). Ms. Mann also testified that she did not know the Defendant before the accident, so had no knowledge of how the Defendant was prior to the accident. (PC Vol. I 157). Ms. Mann was not aware of any legal steps the Defendant took to retain his parental rights of their daughter. (PC Vol. I 156). She testified that the Defendant and his sister were not interested in each other. (PC Vol. I 158). She was not aware of the Defendant's conviction for attempted burglary or his subsequent arrest. (PC Vol. I 159).

On re-direct examination, she testified she and the Defendant recently started writing her letters about their daughter Sara. (PC Vol. I 160). The Defendant and his daughter have also started writing. (PC Vol. I 160). When the prosecutor objected to this testimony on the basis of relevancy, so did the Defendant who wanted Sara kept out of this. (PC Vol. I 160).

Phillip Douglas Bacha

Phillip Douglas Bacha, who was a teenage friend of the Defendant, testified at the evidentiary hearing. (PC Vol. I 161). They were passing acquaintances in grade school and became friends when he visited the Defendant in the hospital after the car accident. (PC Vol. I 162-163). The Defendant's friend, Diana, was killed in the accident. (PC Vol. I 163). The Defendant did not talk about Diana much, and only talked about the accident a few times right after it happened. (PC Vol. I 163). Mr. Bacha testified he and the Defendant hung out together and "did some

drinking" and "some drugs" and did typically stupid teenage type stuff like "raising hell" and smoking marijuana. (PC Vol. I 164). He testified that the Defendant was "a very highly intelligent guy," and they had mutual interests in music and "things they read." (PC Vol. I 165). When he went into the Navy in June of 1986, he and the Defendant remained in contact by writing letters and seeing each other whenever he was on leave. (PC Vol. I 166, 168). They were good friends and he trusted the Defendant. (PC Vol. I 166). Mr. Bacha served in the Navy until April of 1992. (PC Vol. I 168). He lost contact with the Defendant his last few years in the Navy. (PC Vol. I 166). He did not hear about the Defendant and the case until 1991 when his ship was leaving Hawaii and heading back to San Diego. (PC Vol. I 167). The Defendant's attorney never contacted him to testify. (PC Vol. I 167). If asked, he would have testified if the government and the Navy allowed him to do so, but he did not know if they would have. (PC Vol. I 167).

On cross-examination Mr. Bacha testified the last time he had meaningful contact with the Defendant was in 1990. (PC Vol. I 168). Mr. Bacha stated he was aware of the Defendant's white supremacist tattoos, but stated the Defendant got them after they went their separate ways. (PC Vol. I 170, 172). The Defendant did talk about his notions of white supremacy in passing and Mr. Bacha did not think that the Defendant was a card-carrying Nazi. (PC Vol. I 170-171). He and the Defendant started writing letters after he found out the Defendant was in jail, and he learned of the views the Defendant had at that time. (PC Vol. I 172). When Mr. Bacha was on leave and visiting his family, he noted that the Defendant was hanging around with "a certain individual" who was shooting up drugs. (PC Vol. I 172). Mr. Bacha testified the Defendant drifted into harder drugs which had a negative effect on him. (PC Vol. I 174). He was not aware that the Defendant was convicted of attempted burglary or arrested for theft. (PC Vol. I 173).

Shari Roinestad

Shari Roinestad, the mother of one of the Defendant's childhood friends, Michael, testified at the evidentiary hearing. (PC Vol. II 10). She lived in the same neighborhood as the Defendant's parents and knew the Defendant for about a decade. (PC Vol. II 11, 17). She would often see the Defendant daily or at least weekly when he was a teenager. (PC Vol. II

13). She would discuss politics and poetry with the Defendant. (PC Vol. II 11). Ms. Roinestad testified Michael and the Defendant were both fatherless boys as the Defendant's father was very uninvolved. (PC Vol. II 12-13). The Defendant's father was ill and "did not have the lung power to keep Steve Down." (PC Vol. II 13). She visited the Defendant when he was in the hospital after the car accident in which the girl died. (PC Vol. II 14). She admitted that the Defendant started "self-destructing." (PC Vol. II 14). The Defendant told her that he kept seeing the girl fly out the window, over and over again. (PC Vol. II 15). Ms. Roinestad thought that the Defendant suffered from post-traumatic stress disorder from the accident. (PC Vol. II 15). When Michael got married, he and the Defendant split apart and she did not see the Defendant as much. (PC Vol. II 15). The Defendant's attorney did not contact her. (PC Vol. II 16). She felt that the Defendant was a "very intelligent," "very tenderhearted guy" who "has made some bad choices," but she did not know the details of this double homicide. (PC Vol. II 16, 25, 28). Mr. Roinestad testified she was aware of the Defendant's racist views. (PC Vol. II 23-24).

Michael Roinestad

Michael Roinestad, Mr. Roinestad's son and one of the Defendant's teenage friends, testified at the evidentiary hearing. (PC Vol. II 30). He and the Defendant became good friends after the Defendant dropped out of high school. (PC Vol. II 31). Mr. Roinestad testified that it was his former girlfriend that was killed in the car accident and Rob Suber, not the Defendant , was driving the car. (PC Vol. II 33, 34). Mr. Roinestad could not remember Diana's last name. (PC Vol. II 34). There was an awkwardness about the situation because Diana was becoming the Defendant's girlfriend shortly after breaking up with Mr. Roinestad, so he and the Defendant did not discuss the accident much. (PC Vol. II 36). The Defendant's jaw was shattered in the accident and his eyes changed color. (PC Vol. II 36, 37). Mr. Roinestad testified that the Defendant received a settlement from the car accident, put himself through mechanic school, and planned to open a garage. (PC Vol. II 32). Mr. Roinestad testified the Defendant's father loved him but he was not a father figure. (PC Vol. II 40). The Defendant loved his parents but he would not classify him as a "loving son." (PC Vol. II 40). He was not

contacted by the Defendant's attorney or investigator but he would have been glad to testify and would do anything for the Defendant. (PC Vol. II 41). Mr. Roinestad also testified that the first time he was ever contacted about the Defendant's case was by collateral counsel's investigator in 2002. (PC Vol. II 41).

On cross-examination, Mr. Roinestad testified he became good friends with the Defendant when he was 16 years old but they stopped having regular contact when he was 19. (PC Vol. II 42). He and the Defendant were close friends for three years. (PC Vol. II 42). The Defendant's parents were loving, caring people who were good providers. (PC Vol. II 44). He was aware that the Defendant abused drugs and testified that the Defendant started smoking marijuana when he was 14 or 15. (PC Vol. II 45-46). He knew that the Defendant used crystal meth "pretty heavily," and they both snorted meth on several occasions. (PC Vol. II 47-48). Mr. Roinestad was aware of the Defendant's tattoos and knew that the Defendant had rather pronounced racist views.[8] (PC Vol. II 48-49). The Defendant would tone down his racist views around Michael because Michael did not have any tolerance for racism. (PC Vol. II 49). One of the reasons they drifted apart was that the Defendant's racial views were becoming stronger. (PC Vol. II 51). Mr. Roinestad testified he would not be surprised that white supremacy literature was found in the Defendant's home when he was arrested. (PC Vol. II 51). He was not familiar with the Defendant's life for the three years prior to the murders. (PC Vol. II 51). The Defendant would have had to have changed from the person he knew to be a murderer. (PC Vol. II 53). The person he knew would not have committed these crimes and the Defendant "was a different person" which is what led them to drift apart. (PC Vol. II 53).

Findings

Initially, this Court specifically finds Mr. Morrow's testimony both more credible and more persuasive than the Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). Counsel cannot be

[8] Collateral counsel objected to this testimony at the evidentiary hearing, however, the objection was overruled. (PC Vol II 50).

deemed ineffective for failing to call Ms. Bates as Ms. Bates was a witness at the penalty phase. See Floyd v. State, 808 So.2d 175, 189 (Fla. 2002) (rejecting a claim of ineffectiveness were "much of the evidence that the Defendant claims was not included . . . was in fact presented on the Defendant's behalf in mitigation."). Mr. Morrow contacted Ms. Bates several months in advance and spoke with her several times on the phone to prepare her for the penalty phase. Further, much of the testimony Ms. Bates gave at the evidentiary hearing was merely cumulative of her testimony at trial. Brown v. State, 894 So.2d 137 (Fla. 2004); Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation). The mere fact that collateral counsel elicited more information from Ms. Bates, does not establish trial counsel was ineffective. The standard is reasonably effective counsel, not perfect or error-free counsel. Accordingly, this Court finds the Defendant has failed to establish error on the part of counsel in regards to the presentation of mitigation evidence through Ms. Bates. Strickland, 466 U.S. 668.

Ms. Bates was the only family member called to testify at the evidentiary hearing. As such, the Defendant has failed to support his claim that Defendant's "readily-accessible" family members were available to testify on his behalf. No other family members were identified at the evidentiary hearing, and none were named in any of the Defendant's Motions. Mr. Morrow testified that the Defendant adamantly refused to allow him to call the Defendant's parents as witnesses at the penalty phase. Counsel's ability to present other mitigation testimony from the Defendant's family was limited by the Defendant's refusal to let him call the parents. Accordingly, counsel cannot be deemed ineffective. See Brown v. State, 894 So.2d 137, 146 (Fla. 2004).

As for the Defendant's claim that counsel was ineffective for failing to discover other mitigating evidence, there was no evidence presented that Mr. Morrow did any more or any less than reasonable counsel would have done based on the information the Defendant provided. Mr. Morrow testified that the Defendant did give him names of several people to contact for mitigation evidence. Mr. Morrow testified

that most of the people could not be located and those that were would not have been helpful to the Defendant because of their racist views. Mr. Morrow's testimony was clear that he considered the fact that one of the victims was a black man and how evidence of the Defendant's racist views would be received by the jury, as well as how the jury would perceive substance abuse as a mitigator, in deciding on that particular strategy. It was within the wide range of professional judgment for Mr. Morrow to make a tactical decision to not call certain potential witnesses to avoid opening the door to evidence relating to the Defendant's association with a white supremacy organization or skinheads, his racist views, and his substance abuse. Even collateral counsel objected at the evidentiary hearing to the State's cross-examination of Mr. Roinestad concerning the Defendant's pronounced racist views. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So.2d 1044 (Fla. 1982); Gonzalez v. State, 579 So.2d 145, 146 (Fla. 3rd DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.") Further, no evidence or testimony was presented at the evidentiary hearing, or in the Defendant's Motions, that the Defendant ever informed counsel of the witnesses called at the evidentiary hearing.

Absent guidance from the Defendant, Mr. Morrow cannot be deemed ineffective for failing to locate the witnesses that collateral counsel presented at the evidentiary hearing. Ms. Mann moved to another State entirely and she had no contact with the Defendant since she left him until "recently." The Defendant never knew where Ms. Mann moved to and, apparently, could not even provide collateral counsel with her full name. Ms. Nolz had no contact with the Defendant since he was 15 years old. Ms. Nolz never met the Defendant's parents and did not even know that the Defendant had a sister. Mr. Roinestad lost consistent contact with the Defendant when he and her son, Mr. Roinestad split ways. Mr. Roinestad testified that he and the Defendant split ways when he was 19, approximately three years prior to the murders. Moreover, Mr. Roinestad was not contacted by **anyone** about the Defendant's case until 2002, some 10 years after the Defendant was convicted. While there was no testimony regarding when Ms. Roinestad was contacted,

presumably it was around the same time as her son. In 1991, Mr. Bacha was in the Navy, stationed in Hawaii and transferred to San Diego. Mr. Bacha did not know if the government would have allowed him to testify even if he had been asked. Further, Mr. Bacha testified that he and the Defendant were writing letters after Mr. Bacha heard the Defendant was incarcerated in 1991. As the Defendant was in contact with Mr. Bacha at this time, either the Defendant did not ask counsel to locate him or counsel could not locate him.

Based on the witnesses' own testimony, the fact that Ms. Mann, Ms. Nolz, or Mr. Bacha, were not located is insufficient to establish that counsel's performance fell outside of the wide range of reasonable assistance of counsel. Strickland, 466 U.S. 668. Further, this Court finds counsel cannot be deemed ineffective for failing to locate Mr. Roinestad and Ms. Roinestad when **no one** located and/or contacted them until **ten years after** the Defendant was convicted. Strickland, 466 U.S. 668. As held in Turner v. Crosby, 339 F.3d 1247, 1279 (M.D. Fla. 2003):

> In reviewing counsel's performance, a court must avoid using the distorting effects of hindsight and must evaluate the reasonableness of counsel's performance from counsel's perspective at the time." Chandler v. United States, 218 F.3d 1305, 1316 (11th Circ. 2000) (quotations marks and citations omitted). "[I]t is all too easy for a court, examining counsel's defense after it has been proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland v. Washington, 466 U.S. 668, 689 (1984). "It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or . . . had they been asked the right questions." Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Circ. 1995). The existence of such mitigating affidavits, however, is of little significance because they usually establish "at most the wholly unremarkable fact that with the luxury of time and the opportunity

> to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." Id. at 1514. "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. (quotation marks and citation omitted); see also Chandler, 218 F.3d at 1316 n.20.

Accordingly, the mere fact that collateral counsel found additional witnesses who claim they would have testified on behalf of the Defendant if they had been located and called, by itself, does not support a claim of ineffective assistance of counsel.

Even assuming, *arguendo*, that counsel should have located Ms. Mann, Ms. Nolz, and/or Mr. Bacha, the Defendant must still establish prejudice to his case. Mr. Morrow's tactical decision was to keep out evidence regarding the Defendant's racists views, connections with white supremacy and substance abuse. Mr. Bacha testified that his time spent with the Defendant consisted of drinking and doing drugs, like marijuana. Mr. Bacha testified that the Defendant ultimately drifted into harder drugs. Mr. Bacha also knew of the Defendant's white supremacist tattoos and racist views. If Mr. Bacha was called as a witness, the Defendant would have opened the door for the exact type of evidence counsel diligently tried to keep out. Further, each of the witnesses testified that they knew the Defendant for only brief periods of time and had little to no contact with the Defendant for several years prior to his arrest. Mr. Mann's knowledge of the Defendant, even though they were married for a brief period, is limited to about 24 months of his life. She met the Defendant for the first time after his accident so had no knowledge of his character prior that event. When Ms. Mann left the Defendant she had no further contact with him. Ms. Nolz testified that she knew the Defendant on mostly a social level from the 4th-8th grade. Ms. Nolz also testified that she knew nothing about the Defendant and his life after age 15 as she had no contact with him after that time. Mr. Bacha did not become friends with the Defendant until after the Defendant's car accident. Mr. Bacha entered the Navy in June of 1986 and contact with the Defendant from

that time on consisted of letters and a few visits up until the two drifted apart in 1990.

The evidence presented through Ms. Mann, Ms. Nolz, and/or Mr. Bacha, would constitute very minimal mitigation, if any. Even if the potential mitigation witnesses had been presented during the penalty phase, there is no reasonable probability that the balancing of aggravating and mitigating factors would have resulted in a life sentence. Tompkins v. State, 872 So.2d 230 (Fla. 2003); Jones v. State, 855 So.2d 611 (Fla. 2003). The aggravating factors of prior violent felony conviction, committed during the course of a robbery, committed to prevent a lawful arrest, and cold, calculated, and premeditated,[9] would still far outweigh the mitigation testimony presented at the evidentiary hearing. Based on all of the findings, *supra*, this claims [sic] is denied.

Records introduced

The Defendant failed to carry his burden with respect to his claim that counsel should have provided records and testimony that the Defendant's teenage mother lacked pre-natal care. Ms. Bates was the only witness who testified about the Defendant's real mother, and her knowledge of her was limited to that [sic] fact that she was young and not from the area. Further, the document from the Children's Aid and Family Services, Inc., contains no such information. To the contrary, the document states the Defendant's mother received prenatal care for the three months she was with them and made no mention of what care the woman received prior to her arrival at their facility. Counsel cannot be deemed ineffective for failing to investigated [sic] and/or present mitigation evidence unless the Defendant first establishes that the mitigation evidence exists. Holland v. State, 916 So.2d 750 (Fla. 2005). Accordingly, this ground is denied.

Further, Defendant failed to carry his burden with respect to his claim that counsel should have provided his transcript from the Phoenix Institute of Technology, Inc., presumably to show the Defendant was an intelligent person. The State never presented

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[9] This Court notes that the Florida Supreme Court held that the finding of the heinous, atrocious, or cruel aggravating factor was erroneous, but harmless in view of the other aggravating factors. Stein, 632 So.2d at 1367.

testimony or argument that the Defendant was not an intelligent person. The transcript would not have provided a reasonable probability that the outcome of the penalty phase would have been different. Accordingly the Defendant has failed to establish error on the part of counsel or prejudice to his case. Strickland, 466 U.S. 668.

To the extent the Defendant attempted to argue that counsel was ineffective for failing to submit a "Notice of Mitigating Circumstances," in the Defendant's case as was filed in Christmas' case, the claim has no merit. There was not, and is not, a legal requirement for failing a "Notice of Mitigating Circumstances," and this Court is not going to rule that it should be required. Further, Mr. Morrow testified that he consulted with Alan Chipperfield, one of Christmas' attorneys, regarding this and contemplated filing one in the Defendant's case as well. (PC Vol. I 30). Mr. Morrow testified that, while he was aware that there is no legal requirement to file a notice, there are times when one should be filed. (PC Vol. I 87-88). However, Mr. Morrow testified that a consequence of filing a notice is that the prosecutor is then "tipped off." (PC Vol. I 88). Accordingly, the Defendant has failed to establish that counsel's decision not to file a notice in his case fell outside the wide range of reasonable professional assistance. Strickland, 466 U.S. 668.

Finally, to the extent the Defendant raised the additional claim that counsel was ineffective for leaving the suppression hearing because of his sick child, the claim is procedurally barred. The fact that counsel left during the suppression hearing was raised on direct appeal and the Florida Supreme Court. The Defendant claims that the trial judge erred in allowing the suppression hearing to proceed in the absence of the Defendant's counsel. Stein, 632 so.2d at 1365. Both the Defendant and Christmas filed motions to suppress evidence seized from their residence, but Christmas' counsel handled the presentation of the only witness called at the hearing. Id. The Defendant's counsel had to leave the hearing after Christmas' counsel concluded direct examination, and subsequently waived his appearance at the remainder of the hearing. Id. The Defendant argued on direct appeal that when counsel left the hearing, he was left to represent himself. Id. The Florida Supreme Court held:

> [t]he record reflects that [the Defendant's] counsel discussed the waiver of his presence with [the Defendant] and that, upon inquiry by the judge, [the Defendant] simply requested to remain at the hearing as an observer subsequent to the waiver. Given that the presentation of the testimony was being handled by Christmas's attorney, that [the Defendant] was not placed in the position of having to represent himself, and that [the Defendant] was not prejudiced by his attorney's absence, we conclude that no inquiry by the court was necessary.

Stein, 632 So.2d at 1365. The Defendant cannot raise this issue in a postconviction motion by couching it in terms of ineffective assistance of counsel. See Medina v. State, 573 So.2d 293 (Fla. 1990) (affirming the denial of post-conviction relief and holding that issues that had been raised or should have been raised on direct appeal are barred in post-conviction proceedings); Arbelaez v. State, 775 So.2d 909 (Fla. 2000) ("Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel."); Cherry v. State, 659 So.2d 1069 (Fla. 1995); Chandler v. State, 634 So.2d 1066 (Fla. 1994); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1994); Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994); Swafford v. State, 569 So.2d 1264 (Fla. 1990); Medina v. State, 573 So.2d 293 (Fla. 1990). Even if the Defendant's claim was not procedurally, the Florida Supreme Court found that the Defendant was not prejudiced as result of his counsel leaving the hearing. Accordingly, this claim is denied.

Merits

INEFFECTIVENESS AT GUILT PHASE

Stein asserts that his trial counsel was ineffective for seeking a jury pardon and for conceding guilt to the armed robbery charge without his prior consent.

Trial

Counsel filed a motion to suppress Stein's confession. At the motion to suppress hearing, Detective Baxter testified. (T. Vol. VII 79). Stein admitted his participation in the robbery. (T. Vol. VII 89). Stein admitted that the victims knew Christmas. (T. Vol. VII 89). Stein admitted taking approximately $900.00 (T. Vol. VII 89). Stein refused to identify who the actual shooter was. (T. Vol. VII 89). Stein said it was a "robbery gone bad." (T. Vol. VII 90). The trial court denied the motion to suppress Stein's confession.

At trial, defense counsel reserved his opening statement until the defense case-in-chief. (T. VIII 422). At trial, Stein's confession was admitted. After the State's presentation, the defense rested rather than present any case. (T. IX 741).

In closing, defense counsel told the jury to go to robbery first on the verdict form. (T. X 796). He stated: "I want you to check guilty on that because I think the evidence has shown

beyond a reasonable doubt that he is guilty of robbery." (T. X 797). However, counsel's next statement was: "the rest was subject to debate." Counsel argued that first degree, second degree, third degree murder and manslaughter are "equally possible". (T. X 798). Counsel repeated his directions to check robbery but argued that the rest was subject to debate. (T. X 798). Counsel pointed out that, unlike Stein who had confessed, Christmas denied any involvement. (T. X 798). Counsel argued that Christmas was the convicted felon and that he, not Stein, was the master mind. (T. X 799). Counsel argued determining who was the shooter was important in deciding a true and fair verdict. (T. X 800). Counsel urged the jury to consider second degree, third degree murder and manslaughter rather than just first degree murder. (T. X 802). Counsel then went through the elements of the lesser included offense of second degree murder. (T. X 803-804).

Evidentiary hearing

At the evidentiary hearing, trial counsel, Mr. Morrow, testified that he planned conceding to robbery. (PC Vol. I 38). Trial counsel acknowledged that robbery was the basis for the felony murder conviction. (PC Vol. I 38). Trial counsel acknowledged that, under the law, if Stein was involved in the robbery he was liable for felony murder. (PC. Vol. I 38). Mr.

Morrow testified that he talked with Stein about this aspect of the case. (PC. Vol. I 38). He informed Stein that being involved in the robbery made him guilty of felony murder and eligible for the death penalty. (PC. Vol. I 38).[10] Mr. Morrow discussed conceding to robbery if Stein's confession was admitted at trial with both Alan Chipperfield and Hank Coxe. (PC. Vol. I 38). He admitted to the robbery but then argued for a lesser included offense conviction such as second degree murder. (PC. Vol. I 38). He was looking for a jury pardon. (PC. Vol. I 39). Mr. Morrow directly testified that Stein agreed that he could plead him guilty to robbery. (PC. Vol. I 39). They discussed this trial strategy during several conferences at the jail and when Mr. Morrow saw Stein during court appearances. (PC. Vol. I 39,40,41). They had "complex" and "serious" discussions about

[10] While technically eligible for the death penalty under Florida law, the Florida Supreme Court only rarely affirms death sentence based on single aggravators and has never affirmed a death sentence based on the single aggravator of felony murder. *Almeida v. State*, 748 So.2d 922, 933 (Fla. 1999) ("As a general rule, death is not indicated in a single aggravator case where there is substantial mitigation."). It is only cases involving the more serious single aggravators, such as HAC or the prior violent felony aggravator involving a prior murder, that are affirmed by the Court. The HAC aggravator found by the trial court was struck on appeal because this was a shooting homicide and Stein had not been convicted of any prior violent felony, much less a prior murder.

Moreover, juries are also less likely to recommend death based solely on felony murder rather than on a finding of premeditated murder. So, conceding to felony murder alone is unlikely to result in a death sentence either in the trial court or on appeal.

the concession. (PC. Vol. I 41-42). The matter was discussed "in great detail." (PC. Vol. I 42). Mr. Morrow admitted that there was no valid legal theory or defense that the jury could convict of robbery but not felony murder. (PC. Vol. I 44-45). It was a jury pardon strategy. (PC. Vol. I 45). He had explained the concept of jury pardons to Stein. (PC. Vol. I 46). Trial counsel explained that in a sense a conviction for robbery automatically results in a conviction for felony murder but in another sense it does not. (PC. Vol. I 45). He recommended this strategy to Stein but Stein agreed. (PC. Vol. I 47,76). Stein responded "yes, you're right" on several occasions during these discussions. (PC. Vol. I 47). Mr. Morrow explained that because of Stein's confession and the strength of the case, a concession to robbery was his best chance of getting a life sentence. (PC. Vol. I 47,76). There was no realistic chance of the jury not convicting Stein of robbery. (PC. Vol. I 48). Trial counsel "firmly recalled" that he had Stein's permission to make the concession argument. (PC. Vol. I 48). The alternative strategy was to stonewall and make the State prove every element and hope they could not. (PC. Vol. I 48). But he thought then and still thinks today that the jury pardon was the better strategy. (PC. Vol. I 49). Trial counsel asked collateral counsel if he could think of a better strategy. (PC. Vol. I 49). Counsel admitted that a jury pardon strategy is a "last ditch" effort which is

employed only when you do not have other defenses and "not something you want to hang your hat on" if you can help it. (PC. Vol. I 56). He testified that the evidence against Stein was overwhelming. (PC. Vol. I 63). He felt his best strategy was to pursue a jury pardon and gave an example of a jury pardon in a capital sexual battery with numerous confessions which he had handled. (PC. Vol. I 63). Counsel had been successful with jury pardons in the past. (PC. Vol. I 77). Counsel noted that Stein had confessed that he was involved in the Pizza Hut robbery and the robbery had gone bad. (PC. Vol. I 75). It was this confession that led to his jury pardon strategy. (PC. Vol. I 75). Counsel attempted to get the confession suppressed but the motion was denied. (PC. Vol. I 75). Counsel wanted to maintain credibility with the jury by conceding to the facts in Stein's confession. (PC. Vol. I 76).

Stein did not testify at the evidentiary hearing. He did not testify that counsel did not inform him of the trial strategy of pursuing a jury pardon and conceding to robbery.

Argument

There was no deficient performance regarding employing the jury pardon strategy. Seeking a jury pardon is a rather common trial strategy. ***Walls v. State***, 926 So.2d 1156, 1166 (Fla. 2006)(rejecting a claim of ineffectiveness, in a capital case,

for failing to move to redact a tape because it supported the defense theory of a "burglary gone bad."); *Walton v. State*, 847 So.2d 438, 457 (Fla. 2003)(noting the theory of the defense was a robbery gone bad). Common trial strategies, by definition, are not deficient performance because the deficient performance prong of *Strickland* depends on "prevailing professional norms." *Strickland*, 466 U.S. at 688. If a trial tactic is widely employed by the defense bar, it cannot be deficient performance.

Collateral counsel has yet to explain how trial counsel was suppose to deal with Stein's confession to the robbery which, of course, was an implied confession to felony murder. At the evidentiary hearing, trial counsel admitted that a jury pardon strategy is a "last ditch" effort which is employed only when you do not have other defenses and "not something you want to hang your hat on" if you can help it. (PC. Vol. I 56). Often, in criminal cases with overwhelming evidence of guilt, trial counsel must employ "Hail Mary pass" defenses because there is no other option. *Zamora v. State*, 422 So.2d 325, 328 (Fla. 3d DCA 1982)(finding no ineffectiveness for presenting a defense that was not legally recognized where the defendant had no viable defense because in "this uncompromising position, defense counsel cannot be faulted for selecting a tack which, by allowing for the presentation of evidence as to the defendant's

unfortunate background, may have at least evoked the sympathy of the jury and a consequent jury pardon, if nothing better.")

Nor was there any prejudice from the jury pardon trial strategy. During the evidentiary hearing, trial counsel asked collateral counsel if he could think of a better strategy. (PC. Vol. I 49). Trial counsel explained that he was just teasing but, in fact, that is exactly what *Strickland* requires - collateral counsel must prove that there was a significantly better strategy that trial counsel did not pursue.

Collateral counsel asserts that seeking a jury pardon is never a permissible trial strategy and is "intrinsically improper." IB at 44-45. While trial counsel is not permitted to openly advocate to the jury that they ignore the evidence or the law, this does not make a trial strategy of jury pardon impermissible. *Cf. Vickery v. State*, 869 So.2d 623, 625-626 (Fla. 5th DCA 2004)(Sawaya, C.J., concurring)(explaining that the jury pardon concept has become ingrained in the rules of criminal procedure relating to determination of degree of offense and determination of attempts and lesser included offenses and observing that "Florida courts have fully embraced it as an integral part of our jurisprudence."). While the State

may not approve of jury pardons, Florida courts do and counsel is not ineffective for recognizing this.[11]

Stein also asserts a *Nixon* claim is based on the overruled case of *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000), *overruled*, *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed. 565 (2004). Stein must meet the *Strickland* standard regarding this claim of ineffectiveness under current United States Supreme Court caselaw.

Counsel's decision to concede to the robbery charge was a reasonable trial tactic. First, trial counsel testified at the evidentiary hearing that he discussed this with Stein and "firmly recalled" that he had Stein's permission to make the concession argument. (PC. Vol. I 48). Stein did not testify at the evidentiary hearing. *Bell v. State*, 2007 WL 1628143, *6 (Fla. June 7, 2007)(rejecting a claim of ineffectiveness for misadvice, in part, because Bell did not testify at the evidentiary hearing, and so the claim was "without support in the record before this Court."). Moreover, Stein had confessed to the robbery. The confession was admitted at trial. Counsel

[11] Moreover, even if not a winning trial strategy, it can succeed on appeal in relation to the death sentence. *Terry v. State*, 668 So.2d 954, 965-966 (Fla. 1996)(reversing death penalty where murder resulted from a "robbery gone bad"); *Sinclair v. State*, 657 So.2d 1138 (Fla.1995); *Thompson v. State*, 647 So.2d 824 (Fla. 1994). Trial counsel is not ineffective for employing a strategy that is more of an appellate strategy than a trial strategy and/or a strategy that is aimed more at the penalty than guilt.

admitted that this was a “robbery gone bad” because that was Stein’s exact description of the crime. Counsel’s concession merely mirrored Stein’s own confession. Collateral counsel has yet to explain how trial counsel was supposed to deal with Stein’s confession to the robbery. Therefore, counsel’s performance was not deficient.

Nor was there any prejudice. Regardless of counsel’s implied concession of felony murder, the State’s evidence established that this was a conspiracy to commit premeditated murder. The State’s evidence included testimony from Stein’s roommate that they discussed how to perform the robbery including the problem of witnesses. Kyle White, their roommate, testified at trial that approximately one week prior to the robbery, he had an unusual conversation with Stein and Christmas. (T.IX 600). They discussed the alarm system at the Lem Turner Pizza Hut but White told them that it was a motion detector alarm and that there was "no way to beat it" (T.IX 610). Stein asked about the Edgewood Pizza Hut. (T.IX 610). Christmas told him that he worked at the Edgewood Pizza Hut and they did not have an alarm. (T.IX 615). White told them that it would take 20 minutes because the safe was time locked and they could not be inside that long. (T.IX 616). White told them that they did not have to kill because Pizza Hut policy was to cooperate with robbers just give the money with no questions.

(T.IX 616). Both Stein and Christmas said there could be no witnesses. (T.IX 617). Christmas was a former employee of the Edgewood Pizza Hut where the crimes occurred and would have been recognized by the victims who were shift supervisors. This was a conspiracy to commit premeditated murder between Stein and Christmas with robbery being the motive. The jury would have convicted of first degree murder regardless of any concession.

INEFFECTIVENESS AT PENALTY PHASE

Stein asserts that his trial counsel was ineffective for failing to investigate and present several friends as mitigating evidence in the penalty phase. Stein argues that his trial counsel, Jeff Morrow, was ineffective for failing to present mitigating evidence of his "disengaged" adoptive parents; his "marginalized" teenage years including substance abuse; his adoptive parents' poor health and an automobile accident in which a friend died. IB at 50.

Penalty phase

Trial counsel presented two witnesses at the penalty phase. Stein's older sister, Sandra Griffin, who was also adopted, testified that sentencing Stein to death would serve no useful purpose. (T. X 856, T. X 862). Stein's girlfriend, Christine Moss, testified that Stein was a "father figure" to her son and that sentencing Stein to death would serve no useful purpose and if sentenced to life there was the possibility that he could develop into "a person capable of great things" (T. X 862-865). Basically, both defense witnesses pled for mercy.

Evidentiary hearing

Defense trial counsel, Mr. Jeff Morrow, testified that he was appointed to represent Stein on January 21, 1991 and did all

the pretrial work, as well as the trial and penalty phase. (PC Vol. I 10). This was the first capital cases that he handled by himself and his first penalty phase. (PC Vol. I 16,17,92). His timesheet was introduced as defense exhibit #1. (PC Vol. I 11). He had billed for discussions of Stein's case with both Hank Coxe and Alan Chipperfield. (PC Vol. I 10,67).[12] He consulted with Resource Attorney Hank Coxe on mitigation strategy. (PC Vol. I 22-23,67). Because the co-perpetrator Christmas was represented by two very experienced attorneys, Mr. Morrow, would often follow their lead regarding discovery, etc. (PC Vol. I 30-31).[13] He hired a defense investigator, Ken Moncrief, to help him. (PC Vol. I 18). He obtained Stein's records from Phoenix, Arizona, where Stein grew up, including records from the Phoenix Institute of Technology, which was a technical school that Stein attended. (PC Vol. I 19). Mr. Morrow could not recall his reason for not introducing the technical school records at the penalty phase. (PC Vol. I 26). The record from the Phoenix

[12] Henry M. Coxe III, who is president-elect of the Florida Bar, is listed as a resource attorney on the Commission for Capital Cases' website. Resource Attorneys, such as Mr. Coxe, are experienced criminal defense lawyers who are available to consult with registry attorneys on capital cases.

APD Chipperfield represented the co-perpetrator, Marc Chistmas, who was tried separately. So, Mr. Chipperfield was intimately acquainted with the details of this robbery/murder case.

[13] During the evidentiary hearing, trial counsel explained that he had to leave the motion to suppress hearing because he was "real sick" but counsel for Christmas continued with the hearing. (PC Vol. I 55)

Institute of Technology was introduced as defense exhibit #2. (PC Vol. I 28). His billing notes reflect he reviewed school records. (PC Vol. I 21).

His billing notes also reflect numerous conversations with Dr. Krop, who was retained to consult on mental issues, but ultimately was not called at the penalty phase. (PC Vol. I 22,71). Dr. Krop is a licensed psychologist who often testifies in mitigation in capital cases and who knows "neuro psych." (PC Vol. I 94). Dr. Krop makes an excellent witness in counsel's opinion. (PC Vol. I 94). However, Dr. Krop could not provide counsel with mental mitigation. (PC Vol. I 32,72). Dr. Krop himself informed counsel, after his examination of Stein, that he would not be helpful which is why counsel did not call him as a mental health expert during the penalty phase. (PC Vol. I 72-73,94). Trial counsel was aware that mental health mitigation is some of the best possible mitigation but it was not available. (PC Vol. I 34).

He presented Ms. Moss (Stein's girlfriend) and Ms. Griffin (Stein's sister) in the penalty phase as mitigation witnesses. (PC Vol. I 36). He had contacted Stein's sister months prior to the penalty phase. (PC Vol. I 37). Mr. Morrow testified that he spoke on the telephone, on "several occasions", with Stein's sister who was presented as a mitigation witness in the penalty phase. (PC Vol. I 18). He discussed Stein's background with

the sister in the months prior to the penalty phase. (PC Vol. I 37). He prepared Stein's sister for her testimony at the penalty phase. (PC Vol. I 36). He was hoping to humanize Stein with the testimony of Stein's girlfriend and Stein's sister. (PC Vol. I 37).

Trial counsel discussed mitigation with Stein. (PC Vol. I 66). Stein did not want his parents involved in the penalty phase. (PC Vol. I 23). His adoptive parents were old and in poor health. (PC Vol. I 23). He urged Stein to allow him to call his parents in mitigation. (PC Vol. I 66). Both Stein and his sister informed counsel that his parents did not want to get involved and "they just don't want anything to do with it". (PC Vol. I 66). Counsel noted that under federal caselaw that if a defendant does not want his parents called to testify that was "his prerogative". (PC Vol. I 18).[14]

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[14] Florida Supreme Court caselaw also holds that an attorney is not ineffective in a capital case for following the wishes of his client. ***Reed v. State***, 875 So.2d 415, 435 (Fla. 2004)(rejecting an ineffectiveness claim for failing to present testimony of family and friends as mitigating evidence in the penalty phase because Reed did not want them involved citing ***Sims v. State***, 602 So.2d 1253, 1257-58 (Fla.1992)(finding no error in trial counsel's failure to investigate mitigating evidence where client directed counsel not to; "Counsel certainly has considerable discretion in preparing a trial strategy and choosing the means of reaching the client's objectives, but we do not believe counsel can be considered ineffective for honoring the client's wishes.")); ***Brown v. State***, 894 So.2d 137, 146 (Fla. 2004)(stating that "an attorney will not be deemed ineffective for honoring his client's wishes."); ***Waterhouse v. State***, 792 So.2d 1176, 1183 (Fla. 2001) (holding that counsel was not ineffective for failing to

Mr. Morrow explained his trial strategy was basically to try to save Stein's life by humanizing him and portraying Christmas as the actual triggerman during the robbery. (PC Vol. I 31). He was worried because he had little in the way of good mitigation evidence. (PC Vol. I 33-34). Mr. Morrow expressed regret for not visiting Phoenix, Stein's hometown. (PC Vol. I 34). Today, looking back on it and with more experience, he would "camp out there." (PC Vol. I 35,36).

He planned conceding to robbery and seeking a jury pardon on the murder charges. (PC Vol. I 38). Mr. Morrow also explained that he was concerned about evidence that Stein was a skinhead and he was attempting to keep that out of the trial. (PC. Vol. I 50). Stein had racial tattoos and was involved in a hate crime. (PC. Vol. I 50,69). Mr. Morrow noted that there was evidence that Stein was a white supremacist. (PC Vol. I 68). Counsel noted that he managed to keep that out of the trial. (PC Vol. I 68). He did not want the issue of a hate crime coming up because it would be too damaging. (PC Vol. I 68).[15] One of the

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present certain mitigation evidence where the client instructed him not to pursue that evidence). Trial counsel is not ineffective for following the wishes of his client.

[15] Counsel did, by and large, succeed in keeping this out of the trial. It was accidently referred to in passing at one point but was not a feature of the trial. *Stein*, 632 So.2d at 1365 (affirming the denying of a mistrial where a statement made by a detective during a deposition in which the detective referred to Stein as a "skin head" was inadvertently read to the jury).

victims was African-American. (PC Vol. I 70). Stein gave counsel the names of friends as mitigation witnesses but the investigator could not locate them. (PC Vol. I 70). Counsel was concerned about the friends having information regarding Stein's white supremacist views. (PC Vol. I 71). The prosecutor went through trial counsel's billing record as to the mitigation preparation. (PC Vol. I 82-87). Counsel did not want to present drug abuse as mitigation. (PC Vol. I 88). Counsel believes that drug abuse is "not good". (PC Vol. I 89). It is a two-edged sword and a jury can view drug abuse as aggravation rather than mitigation. (PC Vol. I 89,90). Stein did not have a significant criminal history and this was found in mitigation. (PC. Vol. I 51).[16]

Collateral counsel presented Stein's sister, Sandra Griffin Bates, who had testified at the penalty phase, once again at the evidentiary hearing. (PC Vol. I 104). She is a registered nurse. (PC Vol. I 130). Both she and Stein were adopted. (PC Vol. I 106,110). She testified that her adoptive parents had waited 13 years for children. (PC Vol. I 106). Her mother had nine miscarriages. Her parents opened their hearts to their adopted children. (PC Vol. I 109-110). Her parents had a loving relationship with Stein, whom they adored. (PC Vol. I

[16] Stein had been convicted of attempted burglary according to the PSI. (PC. Vol. I 52).

107,109). They grew up in Maywood, New Jersey, which is a very small city, where Stein was involved in Boy Scouts. (PC Vol. I 107,126). In 1977, when Stein was nine years old, they moved to Phoenix, Arizona due to her mother's health. (PC Vol. I 107-108). While the move improved her mother's arthritis, her mother suffered from other illnesses. (PC Vol. I 109). At first, their father was unemployed and money was tight, so it was a stressful time. (PC Vol. I 111). Stein lived in an orphanage until he was adopted at eight months. (PC Vol. I 110). She knew nothing about Stein's natural mother. (PC Vol. I 110). She got married when she was eighteen and moved to Guam. (PC Vol. I 113). She wrote letters to Stein during this time. (PC Vol. I 113). She got a divorce and moved back home. (PC Vol. I 114). She remarried and had a child. (PC Vol. I 114). She remembers Stein being in a bad accident and being hospitalized on June 14. (PC Vol. I 115). One of the passengers died. (PC Vol. I 115). Stein fractured his jaw in the accident. (PC Vol. I 115). Their mother was diagnosed with diabetes which led to renal failure. (PC Vol. I 116). Her father had a form of emphysema. (PC Vol. I 116). She did not remember Stein's counsel preparing her for her penalty phase testimony. (PC Vol. I 118). On cross, she testified that the family was rich in love and emotional support. (PC Vol I 121). Her parent's marriage was long and they were devoted to each

other. (PC Vol. I 123). She testified that Stein was "very smart." (PC Vol. I 126). She did not recall Stein being arrested or convicted for attempted burglary. (PC Vol. I 128-129). Nor did she recall Stein being arrest for stealing from a business. (PC Vol. I 129).

Donna Nolz, who went to elementary school with Stein in Phoenix, testified at the evidentiary hearing. (PC Vol. I 133). They were in the same grade but not the same class. (PC Vol. I 134). She testified Stein was a quiet, laid back person. (PC Vol. I 134). Stein did not attend school regularly, not because he was sick but because, as Stein told her, he "just didn't feel like going to school." (PC Vol. I 135). The other kids in school would tease Stein about being an albino because he was so pale. (PC Vol. I 136,137,142-143). It was hard for her to recall anything else about Stein because they "had not encountered each other that much." (PC Vol. I 136). Stein was peaceful and did not pick fights. (PC Vol. I 136-137). Stein was not disliked but was not popular. (PC Vol. I 137). Stein was someone that you would be glad to run into in the store. (PC Vol. I 138). She testified that no one came out to Phoenix to talk to her about Stein but she admitted that they had lost contact since high school. (PC Vol. I 138). She would have been glad to testify if contacted and probably would have been able to recall more about Stein. (PC Vol. I 139). On cross, she

testified that she and Stein lost contact about the freshman year of high school. (PC Vol. I 139). She knew nothing about Stein's life after age 15. (PC Vol. I 140). She knew Stein from about the 4th grade through the 8th grade. (PC Vol. I 140). They also lived in the same neighborhood. (PC Vol. I 141). She did not know that Stein had an older sister. (PC Vol. I 141). She went to his home once. (PC Vol. I 141). She expressed concern about his parents allowing Stein to skip school whenever he wanted. (PC Vol. I 141). She was not close enough to Stein to know whether he was telling the truth about being allowed to miss school or being sick. (PC Vol. I 142). Stein was not picked on in school, just occasionally teased. (PC Vol. I 143).

Shandra Elaine Johnson Mann, who was Stein's teenage wife and the mother of his child, testified at the evidentiary hearing. (PC Vol. I 144-145). They met when a friend of hers brought her over to Stein's parent's home when she was 15 years old. (PC Vol. I 145). She testified that Stein was "very smart." (PC Vol. I 147,157). She also testified that she like the fact that Stein was "very reckless" and "did not really care about consequences." (PC Vol. I 147,152,153). She basically moved into Stein's parent's house. (PC Vol. I 147). Stein's parent's were ill and elderly and did not care what they did. (PC Vol. I 148). She got pregnant. (PC Vol. I 148). She told Stein that she was going to give the baby up for adoption. (PC

Vol. I 148). Stein was upset and wanted to keep the child. (PC Vol. I 148). Stein was opposed to adoption because he had been adopted himself which caused him pain. (PC Vol. I 148-149). Stein was devastated by her decision which went against everything he believed. (PC Vol. I 151). Stein "as a child of adoption" had been lonely and felt no bond with his parents. (PC Vol. I 151). Stein was hurt by the whole adoption process and did not want to do that to his child. (PC Vol. I 152). They were married at the time she became pregnant. (PC Vol. I 149). While they were married, Stein worked at a gas station "for a while". (PC Vol. I 159). She moved to another state and gave the child up for adoption. (PC Vol. I 150). She was seventeen at the time she became pregnant. (PC Vol. I 150). She did not speak with Stein for a "really long time" after the adoption. (PC Vol. I 151,152). They were divorced. (PC Vol. I 152). The reason for the divorce was her decision to give their child up for adoption. (PC Vol. I 152). They had no further contact after her moving away and the adoption. (PC Vol. I 152). She was pressured by her parent to give the child up for adoption. (PC Vol. I 153). No one contacted her to discuss Stein or testify at the penalty phase. (PC Vol. I 153). They were together for 1½ to 2 years. (PC Vol. I 154). They had little to no contact after that. (PC Vol. I 154). So, her knowledge of Stein is limited to about 24 months of his life. (PC Vol. I 154). She

admitted that they had no respect for bedtime or mealtime or his parents. (PC Vol. I 155). She was not aware of any legal steps Stein took to retain his parental rights of their daughter. (PC Vol. I 156). She testified that Stein and his sister were not interested in each other. (PC Vol. I 158). She was not aware of Stein's conviction for attempted burglary or his subsequent arrest. (PC Vol. I 159). She and Stein started writing letters about their daughter Sara. (PC Vol. I 160). Stein and his daughter have also started writing. (PC Vol. I 160). When the prosecutor objected to this testimony on the basis of relevancy, so did Stein who wanted Sara kept out of this. (PC Vol. I 160).

Phillip Douglas Bacha, who was a teenage friend of Stein's, testified at the evidentiary hearing. (PC Vol. I 161). They were passing acquaintances in grade school. (PC Vol. I 162). They became friends when he visited Stein after the car accident. (PC Vol. I 163). Stein's friend Diana was killed in the accident. (PC Vol. I 163). Stein's injuries were fairly bad. (PC Vol. I 163). He and Stein hung out together and "did some drinking" and "some drugs" and did typically stupid teenager type stuff like "raising hell" and smoking marijuana. (PC Vol. I 164). He testified that Stein was "a very highly intelligent guy". (PC Vol. I 165). When he went into the Navy, he and Stein remained in contact by writing letters. (PC Vol. I 166). They were very good friends and he trusted Stein. (PC

Vol. I 166). Stein's attorney never contacted him to testify. (PC Vol. I 167). He entered the Navy in June of 1986 and remained in the Navy about 6 years. (PC Vol. I 168). He is currently a stationary engineer at a hospital. (PC Vol. I 169). He is aware of Stein's tattoos. (PC Vol. I 170). Stein got the white supremacist tattoos after they went their separate ways. (PC Vol. I 172). He did not think that Stein was a card-carrying Nazi. (PC Vol. I 171). He noticed that Stein was hanging around with "a certain individual" who was shooting up drugs. (PC Vol. I 172). He was not aware that Stein was convicted of attempted burglary or arrested for theft. (PC Vol. I 173). Stein drifted into harder drugs which had a negative effect on him. (PC Vol. I 174).

Shari Roinestad, who was the mother of one of Stein's childhood friends, testified at the evidentiary hearing. (PC Vol. II 10). She lived in the same neighborhood as Stein's parents. (PC Vol. II 11). She knew Stein for about a decade. (PC Vol. II 17). She would discuss politics and poetry with Stein. (PC Vol. II 11). Her son and Stein were both fatherless boys. (PC Vol. II 12). Stein's father was very uninvolved. (PC Vol. II 13). Stein's father was ill and "did not have the lung power to keep Steve down". (PC Vol. II 13). She would often see Stein daily or at least weekly when he was a teenager. (PC Vol. II 13). She visited Stein when he was in the hospital after the

car accident in which the girl died. (PC Vol. II 14). She testified that he and Michael had several automobile accidents. (PC Vol. II 14). She admitted that Stein started "self-destructing". (PC Vol. II 14). Stein told her that he kept seeing the girl fly out the window, over and over again. (PC Vol. II 15). She thought that Stein suffered from post-traumatic stress disorder from the accident. (PC Vol. II 15). When her son got married, he and Stein split apart and she did not see Stein as much. (PC Vol. II 15). Stein's attorney did not contact her. (PC Vol. II 16). She felt that Stein was a "very tenderhearted guy" who "has made some bad choices" but "haven't we all." (PC Vol. II 16). She testified that she thought that Stein had a "great respect for human life" from his poetry and songs. (PC Vol. II 21). She did not know the details of this double homicide. (PC Vol. II 28). She was very liberal and Stein was very conservative. (PC Vol. II 23). She was aware of Stein's racism (PC Vol. II 23). She admitted that Stein's views were racist. (PC Vol. II 24). She testified that Stein was "very intelligent." (PC Vol. II 25).

Michael Roinestad, who was Shari Roinestad's son and one of Stein's teenage friends, testified at the evidentiary hearing. (PC Vol. II 30). He and Stein became good friends after he dropped out of high school. (PC Vol. II 31). Stein received a settlement from the car accident and planned on opening a

garage. (PC Vol. II 32). Stein put himself through mechanic school. (PC Vol. II 32). It was his former girlfriend that was killed in the car accident. (PC Vol. II 33). Rob Suber, not Stein, was driving the car. (PC Vol. II 34). Both the girl and Stein were passengers. (PC Vol. II 34). He knew the girl's first name was Diana but could not remember her last name. (PC Vol. II 34). The driver rolled his truck. (PC Vol. II 34). There was an awkwardness about the situation because the girl was becoming Stein's girlfriend shortly after breaking up with him, so, they did not discuss the accident much. (PC Vol. II 36). Stein was injured in the accident including having a shattered jaw. (PC Vol. II 36). The accident causes Stein's eyes to change color from a unique blue color to a deep purple. (PC Vol. II 37). Stein's father loved him but he was not a father figure. (PC Vol. II 40). Stein loved his parents but he would not classify him as a "loving son" and Stein was not "a typical Walton loving son." (PC Vol. II 40). He was not contacted by Stein's attorney or investigator but he would have been glad to testify and would do anything for Stein. (PC Vol. II 41). He was one year younger than Stein and became good friends with Stein when he was 16 years old. (PC Vol. II 42). They stopped having regular contact when he was 19 years old. (PC Vol. II 42). So, he and Stein were close friends for three years. (PC Vol. II 42). Stein's parents were loving, caring

people who were good providers. (PC Vol. II 44). He was aware that Stein abused drugs. (PC Vol. II 45). At 14 or 15, Stein was smoking marijuana. (PC Vol. II 46). He knew that Stein used crystal meth "pretty heavily". (PC Vol. II 47). They both snorted meth on several occasions. (PC Vol. II 48). He was aware of Stein's tattoos. (PC Vol. II 48). He knew that Stein had racist views. (PC Vol. II 49). Stein would tone down his racist views around Michael because Michael did not have any tolerance for racism. (PC Vol. II 49). He knew that Stein had rather pronounced racial views. (PC Vol. II 49). Collateral counsel objected to this testimony but the trial court noted that he tried "the best I could to keep these views out of the trial" and that trial counsel had testified he was concerned about keeping these views out also. (PC Vol. II 50). The trial court overruled the objection. (PC Vol. II 50). One of the reason they drifted apart was that Stein's racial views were becoming stronger. (PC Vol. II 51). He would not be surprised that when Stein was arrested there was white supremacy literature in Stein's home. (PC Vol. II 51). He was not familiar with Stein's life for the three years prior to the murders. (PC Vol. II 51). Stein would have had to have changed from the person he knew to be a murderer. (PC Vol. II 53). The Stein he knew would not have committed these crimes and Stein

"was a different person" which is what led to them drifting apart. (PC Vol. II 53). When he and Stein were friends, skin color did not make a difference. (PC Vol. II 54). They had black friends at that time and Stein did not treat them differently from their white friends. (PC Vol. II 54).

The prosecutor noted that collateral counsel had stipulated to the evidence in Christmas' affidavit and agreed that Christmas would testify as in this statement if called to testify at the evidentiary hearing. (PC Vol. I 178). At the end of the evidentiary hearing, the prosecutor introduced Christmas' statement as State's exhibit #1. (PC Vol. II 55-56). The State's exhibit was a sworn statement by Christmas which was taken on May 16, 1996 which was 22 pages. (PC Vol. II 57). Collateral counsel introduced Stein's adoption records as an defense exhibit #3. (PC Vol. II 55-56).

Ineffectiveness

Counsel was not ineffective for adopting a humanizing strategy in the penalty phase. Mr. Morrow explained his trial strategy was basically to try to save Stein's life by humanizing him. (PC Vol. I 31). The Florida Supreme Court has held that, where a defendant does not suffer from "any significant mental impairment", counsel is not ineffective for adopting a

mitigation strategy of “humanization” of the defendant by presenting lay testimony from friends and family members. *Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998)(holding that defense counsel properly relied on a strategy of the “humanization” of the defendant rather than bringing to light evidence of his chronic alcoholism and anxiety disorder); *Jones v. State*, 928 So.2d 1178 (Fla. 2006)(rejecting a claim of ineffective assistance of counsel for failing to present expert mental health testimony because the testimony would have been inconsistent with trial counsel's strategy of humanizing the defendant).

Basically, both defense witnesses presented by defense counsel at the penalty phase, Stein’s sister and his girlfriend, pled for mercy. Pleading for mercy is a common mitigation strategy among the defense bar, employed by no less than Clarence Darrow. *Florida v. Nixon*, 543 U.S. 175, 192, 125 S.Ct. 551, 563, 160 L.Ed. 565 (2004)(observing that: “[r]enowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: "I do not know how much salvage there is in these two boys. ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." (quoting Attorney for

the Damned: Clarence Darrow in the Courtroom 84 (A. Weinberg ed. 1989)).

Trial counsel cannot be ineffective for failing to present Stein's sister at the penalty phase because his sister was, in fact, presented at the penalty phase. Obviously, counsel cannot be ineffective for failing to present a mitigating witness that, he, in fact, presented. *Floyd v. State*, 808 So.2d 175, 189 (Fla. 2002)(rejecting a claim of ineffectiveness where "much of the evidence that the Defendant claims was not included," ... "was in fact presented on the Defendant's behalf in mitigation."). The transcript of the penalty phase conclusively rebuts this claim of ineffectiveness. Nor is there any prejudice. Her testimony at the evidentiary hearing was cumulative of her testimony presented at the penalty phase. "Defense counsel cannot be deemed deficient for failing to present cumulative evidence." *Holland v. State*, 916 So.2d 750, 757 (Fla. 2005)(citing *Gudinas v. State*, 816 So.2d 1095, 1106 (Fla. 2002)(finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation)). Moreover, while she was not cross-examined during penalty phase regarding Stein's prior arrests, she could have been, just as she was during the evidentiary hearing. The State could have used this evidence to

establish that she was not that familiar with Stein's conduct once she moved out of the house.

There was no prejudice regarding the numerous mitigation witnesses presented at the evidentiary hearing. Trial counsel was not ineffective for failing to investigate and present these witnesses because these witnesses' testimony would have opened the door to damaging rebuttal evidence of Stein's racist views and his serious drug use. As trial counsel testified, he was concerned about opening the door to Stein's racist views. One of the victims was African-American. The prosecution was aware that Stein was a skin head. ***Stein v. State***, 632 So.2d 1361, 1365 (Fla. 1994)(affirming the trial court's denial of a motion for mistrial regarding a suggestion that Stein was a member of a white supremacist group when statement made by a detective during a deposition, in which the detective referred to Stein as a "skin head", were read to the jury). When Stein was arrested there was white supremacy literature in his home. (PC Vol. II 51). Several of these witnesses could have been cross-examined regarding Stein's racial views in the penalty phase just as they were at the evidentiary hearing. Shari Roinestad, who was the mother of one of Stein's childhood friends, testified at the evidentiary hearing that Stein's views were racist. (PC Vol. II 23-24). Michael Roinestad, who was Shari Roinestad's son and one of Stein's teenage friends, testified at the evidentiary

hearing that he knew that Stein had racist views. (PC Vol. II 49). Collateral counsel simply refuses to acknowledge that trial counsel had to be careful in his presentation of mitigating evidence because of Stein's racist views. IB at 53. It was particularly important to avoid Stein's inflammatory racial views in a case where one of the victims was African American.

Testimony that a defendant is an illegal drug abuser is dangerous mitigation. *Pace v. State*, 854 So.2d 167, 173-74 (Fla. 2003)(rejecting a claim that counsel was ineffective for making a strategic decision not to present evidence regarding drug use); *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999)(noting that alcohol and drug abuse is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing); *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir. 1994)(noting that many lawyers justifiably fear introducing evidence of alcohol and drug use); *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir. 1994)(noting reasonableness of lawyer's fear that defendant's voluntary drug and alcohol use could be "perceived by the jury as aggravating instead of mitigating"). Michael Roinestad, who was one of Stein's teenage friends, testified at the evidentiary hearing that Stein used crystal meth pretty heavily. (PC Vol. II 47). Crystal methamphetamine is well know to increase violent tendencies. *United States v. Yoon*, 751

F.Supp. 161, 165 (D.Hawaii 1989)(noting that users of crystal methamphetamine "are subject to paranoia and rash violent action."). Jurors do not view illegal drug use as mitigating and therefore, there was no prejudice from failing to present these witnesses.

In *Hendrix v. State*, 908 So.2d 412, 418 (Fla. 2005), the Florida Supreme Court rejected an ineffectiveness claim involving drug use and the failure to present the same mental expert that was not present in this case. In *Hendrix*, trial counsel consulted a mental health expert, Dr. Krop, but made a strategic decision not to call him because Dr. Krop believed that the murders were cold, calculated acts that were not the result of any mental illness or defect. Trial counsel testified that he did not want to present evidence regarding Hendrix's voluntary use of drugs and alcohol because he did not believe that to be a viable defense in light of the fact that Hendrix was clear-headed when he committed the murder. Further, he did not want to mention drug use because he did not want to alienate the jurors, who he believed were "very conservative." Instead, trial counsel chose to present the argument that Hendrix had a lot of problems and was crying out for help, but that the help he needed was never provided to him. Trial counsel conceded the HAC aggravator because the evidence was clear that it was an extremely brutal murder.

Here, as in *Hendrix,* trial counsel made the reasonable strategic decision not to call Dr. Krop at the penalty phase because Dr. Krop informed counsel that his testimony would not be helpful. Here, as in *Hendrix,* trial counsel did not want to mention drug use because he did not want to alienate the jurors. Trial counsel did not want to present drug abuse as mitigation. (PC Vol. I 88). Counsel believes that drug abuse is "not good". (PC Vol. I 89). As trial counsel noted, it is a two-edged sword and a jury can view drug abuse as aggravation rather than as mitigation. (PC Vol. I 89,90). Here, as in *Hendrix,* trial counsel conceded to robbery because the evidence of robbery from Stein's own confession was clear.

None of the mitigation witnesses presented at the evidentiary hearing by collateral counsel provided any substantial mitigation evidence. *Sliney v. State*, 944 So.2d 270, 285 (Fla. 2006)(rejecting a claim of ineffectiveness for failing to present mitigating evidence of his family's alcohol abuse and noting that even though Sliney's trial counsel presented little evidence in mitigation, it appears that he presented nearly all available evidence). For example, testimony that Stein was a quiet laid back person in elementary school is not compelling mitigation. (PC Vol. I 134). Shandra Mann, who was Stein's teenage wife and mother of his child, testified that Stein was "very reckless" and "did not really care about consequences."

(PC Vol. I 147,152,153). She admitted that they had no respect for bedtime or mealtime or his parents while they where living in his parent's home. (PC Vol. I 155). This is not mitigating. Nor is the fact that Stein, although opposed to adoption, gave his child up, instead of being a father. Stein was "very smart", according to his teenage wife, and certainly could have supported a wife and child. Shari Roinestad's testimony that Stein was a "very tenderhearted guy" who "has made some bad choices" is not mitigating either. (PC Vol. II 16). A double homicide is not a bad choice; it is murder. Such a characterization may well offend a jury. Any possible marginal value of these mitigation witnesses would be substantially outweighed by the negative information also elicited.

Collateral counsel seems to fault trial counsel for agreeing to hold Stein's trial prior to Christmas' trial. IB at 53. This is a meritless claim of ineffectiveness. Trial counsel does not have personal control over when a trial commences. Moreover, when two co-defendants are tried separately, one trial necessarily ends prior to the other. Even if the trials of the co-defendants are started simultaneously, the different proof and different lengths of jury deliberations means that one jury will reach its verdict and sentencing recommendation prior to the other jury. The jury that reaches its decision first will not have any information regarding the

second jury's decision because the second jury has not reached its decision yet. This claim of ineffectiveness should be denied.[17]

[17] While counsel testified that he would have "camped out" in Arizona if he were trying the case today, counsel's admission are not a proper basis to find ineffectiveness. The Florida Supreme Court has noted that an attorney's own admission that he was ineffective "is of little persuasion." *Duckett v. State*, 918 So.2d 224, 237 (Fla. 2005)(rejecting a claim of ineffectiveness for failing to present additional witnesses in mitigation to testify at the penalty phase about Duckett's good character, close family upbringing, loving relationship with his (now ex) wife and two sons, his decision to enter the police force, and general all-around "normal" life before the murder where trial counsel admitted that it was probably a mistake not to call additional witnesses because "this Court has stated that 'an attorney's own admission that he or she was ineffective is of little persuasion in these proceedings.'"); *Mills v. State*, 603 So.2d 482, 485 (Fla. 1992)(observing that an attorney's own admission that he or she was ineffective is of little persuasion relying on *Routly v. State*, 590 So. 2d 397, at 401 n.4 (Fla. 1991) and *Kelley v. State*, 569 So.2d 754, 761 (Fla. 1990)). While admirable, counsel's view as to the extent of a proper investigation, is not the standard for deficient performance. No court has ever held that counsel must "camp out" in a capital defendant's home town to be effective.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE NEWLY DISCOVERED EVIDENCE CLAIM BASED ON THE CO-PERPETRATOR'S LIFE SENTENCE? (Restated)

Stein contends that the co-perpetrator's life sentence is newly discovered evidence. The co-perpetrator, Marc Christmas, was originally sentenced to death by the trial court. On appeal, this Court reduced Christmas' sentence to life because it was a jury override situation. This issue is procedurally barred. The relative culpability of Stein and Christmas was determined by this Court in the Christmas direct appeal. Moreover, where one defendant is more culpable than the codefendant, disparate treatment is permissible. Stein is the more culpable of the two because he was the actual triggerman. Collateral counsel is simply mistaken in his assertion that the trial court found Christmas to be equally or more culpable than Stein. The trial court specifically found in the Christmas sentencing order that "Stein shot both victims." This Court has repeatedly affirmed death sentences for the more culpable defendant where the less culpable co-defendant received a life sentence. So, Stein's death sentence is not disproportionate to Christmas' life sentence.

Facts

Judge Wiggins, in separate proceedings, sentenced both Stein and Christmas to death. First, Judge Wiggins sentenced Stein to death and then several months later, after Stein's case was on appeal in the Florida Supreme Court, he sentenced Christmas to death as well. Stein's jury recommended death by a 10 to 2 vote on June 20, 1991. Judge Wiggins sentenced Stein to death on July 23, 1991. Christmas was convicted several months later on September 26, 1991. (Christmas record Vol. III 543). Christmas' jury recommended life on September 27, 1991. (Christmas record Vol. III 543). Judge Wiggins overrode the jury's life recommendation and sentenced Christmas to death. (Christmas record Vol. III 543-560). Judge Wiggins entered the sentencing order in the Christmas case on November 12, 1991 (Christmas record Vol. III 560).

The trial court's sentencing order, in the Christmas case, stated:

> Two civilian bailiffs testified as to statements made by Marc Christmas regarding what happened in the Pizza Hut. Christmas stated that he and Stein were both in the bathroom when the victims were shot. Christmas was in the bathroom holding a .38 caliber revolver on the victims. Christmas stated that Dennis Saunders reached up and grabbed Stein's gun and Stein shot him. Stein shot both victims while Christmas looked on, holding a gun on them.

(Christmas record Vol. III 546-547).

The trial court's sentencing order, in Stein's case, stated:

> There was strong evidence indicating that Steven Edward Stein did kill or did attempt to kill Dennis Saunders and Bobby Hood. The murder weapon, a rifle, belonged to Stein. Stein and Stein alone was seen carrying the rifle before the robbery-murders. At the time Stein was arrested, the box that the rifle came in was in Stein's room.
>
> The Court finds that Steven Edward Stein clearly intended that any and all witnesses to the robbery would be killed. Stein and his co-defendant specifically discussed and planned for the elimination of all witnesses so that Stein and the co-defendant could not be identified.

(Stein sentencing order)

On appeal, the Florida Supreme Court reversed the trial court's jury override and reduced Christmas' sentence to life. *Christmas v. State*, 632 So.2d 1368, 1371 (Fla. 1994). The Florida Supreme Court's opinion in the Christmas case was issued on January 13, 1994.

Evidentiary hearing

At the evidentiary hearing, trial counsel testified that Stein's jury did not hear that Christmas received a life sentence because Christmas' sentencing did not occur until after Stein's penalty phase. (PC Vol. I 53). Stein and Christmas were tried and sentenced separately. (PC Vol. I 53). Trial counsel noted that Christmas' trial was conducted later than Stein's trial. (PC Vol. I 53). Collateral counsel stated that this was actually a newly discovered evidence claim. (PC Vol. I 53).

Procedural Bar

This issue is barred. The Florida Supreme Court has already rejected a claim that a sentence of death for Stein is disproportionate to a sentence of life for Christmas. This exact issue was raised and rejected in the Christmas direct appeal. *Christmas v. State*, 632 So.2d 1368, 1372 (Fla. 1994)(stating: "we find no disparity in imposing a sentence of death on Stein but a sentence of life imprisonment on Christmas."). The relative culpability and disparity in sentencing between Stein and Christmas has already been determined adversely to Stein by the Florida Supreme Court.

The trial court's ruling

> In ground eight and in ground two of the Defendant's Second Amended Motion, the Defendant claims newly discovered evidence establishes that the Defendant's capital conviction and sentence are constitutionally unreliable. The newly discovered evidence consists of the trial court's finding that the Defendant's co-defendant, Christmas, was great or equally culpable in the crime and sentenced Christmas to a life sentence. The Defendant avers that to execute him and let Christmas live constitutes arbitrary and capricious application of the death penalty. Further, the Defendant avers that he is innocent of the death penalty as newly discovered evidence establishes that the Defendant is actually innocent of the offenses for which he was convicted. The alleged newly discovered evidence consists of a sworn affidavit of Christmas drafted after he was sentenced, in which Christmas stated that he shot and killed Hood and Saunders, not the Defendant.
>
> As to the Defendant's first claim, the Florida Supreme Court specifically found, ". . . no disparity in imposing a sentence of death on [the Defendant] but a

> sentence of life imprisonment on Christmas." Christmas, 632 So.2d at 1372. As to the second claim, at the evidentiary hearing, the prosecutor noted that collateral counsel stipulated to the evidence in Christmas' sworn statement taken by the prosecutor on May 16, 1996. Collateral counsel also agreed that Christmas' testimony, if called at the evidentiary hearing, would be consistent with his sworn statement. (PC Vol. I 178). At the end of the evidentiary hearing, the prosecutor introduced Christmas' affidavit and statement as State's Exhibit #1. (PC Vol. II 55-56). This Court has reviewed both the sworn affidavit and the sworn statement of Christmas provided at the evidentiary hearing. In the statement, Christmas identified the sworn affidavit in which he stated that it was him and not the Defendant, Stein, who shot and killed the two victims. Christmas testified in his sworn statement that he lied in the sworn affidavit and that he was not the trigger man, but that the Defendant, Stein, was the trigger man. Christmas testified in the sworn statement that he lied in the sworn affidavit and to the Defendant's attorneys so he could help the Defendant get off of death row. As collateral counsel stipulated at the evidentiary hearing that Christmas would testify in accordance with this sworn statement if Christmas had been called to testify, this claim is denied.

The standard of review

The standard of review for a claim that the defendant's death sentence is disproportionate to the co-defendant's life sentence is *de novo*. *Demps v. State*, 761 So.2d 302, 306 (Fla. 2000)(reviewing de novo the denial of a claim that newly discovered evidence of an internal prison memo reflecting that the victim named a different inmate as the assailant rendered death sentence disproportionate in light of the life sentences imposed on codefendants).

Merits

This Court has held that a co-perpetrator's subsequent life sentence can be a form of newly discovered evidence. *Marquard v. State*, 850 So.2d 417, 423 (Fla. 2002)(stating that a "codefendant's subsequent life sentence can constitute newly discovered evidence which is cognizable in a 3.850 proceeding."); *Fotopoulos v. State*, 838 So.2d 1122, 1133, n.11 (Fla. 2002)(noting that the codefendant's resentencing which resulted in a life sentence qualifies as newly discovered evidence because it occurred after this defendant's trial and sentencing); *Scott v. Dugger*, 604 So.2d 465, 469 (Fla. 1992)(observing that in "a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence."). For a defendant to succeed on a claim that a death sentence must be set aside because of a codefendant's subsequent life sentence, the defendant must show: 1) the life sentence could not have been known to the parties by the use of due diligence at the time of trial; and 2) the codefendant's life sentence would probably result in a life sentence for the defendant on retrial. *Ventura v. State*, 794 So.2d 553, 571 (Fla. 2001). But "where the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite

the fact the codefendant received a lighter sentence for his participation in the same crime." *Marquard*, 850 So.2d at 423 (quoting *Brown v. State*, 721 So.2d 274, 282 (Fla. 1998)). It is only where the co-perpetrators are equally culpable that the subsequent sentencing of one perpetrator to life entitles the other perpetrator to a new sentencing proceeding. *Scott v. Dugger*, 604 So.2d 465, 469 (Fla. 1992)(explaining that in death cases involving "equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence."). Only if Stein's and Christmas' culpability were equal, would Christmas' life sentence be new evidence sufficient to warrant a new penalty phase at which Stein's new jury would be informed of Christmas' life sentence.

However, they are not equally culpable and therefore, Stein's death sentence is proportionate. Stein was the actual triggerman and therefore, the more culpable of the two. The trial court specifically found in the Christmas sentencing order that "Stein shot both victims." Stein's death sentence, like the death sentences for the more culpable perpetrators in *Marquard*, *Fotopoulos, Ventura*, and *Groover* is proper and does not warrant a new penalty phase. *Marquard*, 850 So.2d at 424 (rejecting a newly discovered evidence claim based on codefendant's sentence being subsequently reduced to life imprisonment because Marquard

was the more culpable defendant); *Fotopoulos v. State*, 838 So.2d at 1133-1134 (rejecting a newly discovered evidence claim based on co-defendant being sentenced to life because the defendant was the most culpable and the most deserving of the death penalty); *Ventura*, 794 So.2d at 571 (denying the defendant's claim because he was the triggerman in the scheme and his codefendant was not equally culpable); *Groover v. State*, 703 So.2d 1035, 1037 (Fla. 1997)(affirming the denial of the defendant's newly discovered evidence claim because the defendant and codefendant were not equally culpable).

Moreover, equally capable means not only equally involved in the murder, which Stein and Christmas were not because Stein was the actual shooter, but equally capable also means equally mitigated. The mitigation established in Christmas' case was greater than the mitigation established in Stein's case. *Christmas*, 632 So.2d at 1371 (noting there was "a significant amount of mitigating evidence" including that "Christmas was easily led by and influenced by others; that he could not have committed this crime alone; and that it was Stein, not Christmas, who actually killed the victims."). As the Florida Supreme Court explained comparing the mitigation in Stein's case to the mitigation in Christmas' case, "[f]ifteen witnesses testified on Christmas's behalf and presented a number of factors to be considered in mitigation. In Stein's case almost

no mitigating evidence was submitted on Stein's behalf." *Christmas*, 632 So.2d at 1372. The disparity in mitigation must be considered in the proportionality review of the two respective sentences. Even if Christmas and Stein were equally culpable of the murders, which they were not, the fact that Christmas has more mitigation means that the disparate sentences are not disproportionate.

Contrary to collateral counsel's claim, the trial court made no judicial finding that Christmas was more culpable than Stein. A comparison of the two sentencing orders shows no such finding. The trial court specifically found in the Christmas sentencing order that "Stein shot both victims." Furthermore, this Court found the opposite. The Florida Supreme Court found that Stein was the actual shooter. *Christmas v. State*, 632 So.2d 1368, 1371 (Fla. 1994)(observing that "it was Stein, not Christmas, who actually killed the victims.").

Collateral counsel seems to assert that the sentencing order in the Christmas case would be admissible at Stein's new penalty phase. IB at 66. This is not correct. The trial court's sentencing order itself would not be admissible at the new penalty phase; only the fact that Christmas' jury recommended life would be admissible. The new jury would not hear Judge Wiggins views regards Stein's and Christmas' relative

culpability; they would determine relative culpability themselves.

Collateral counsel argues that "the lower court failed to analyze whether the Florida Supreme Court would over turn the death sentence as it did in *Christmas*." IB at 64. This is an incorrect statement of the law. The *Jones* standard requires that the trial court analyze whether a new jury would reach a different verdict given the new information, not an appellate court. The trial court properly failed to conduct such an analysis.

Accordingly, this claim should be denied as barred and meritless.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Harry P. Brody, Brody & Hazen, PA, P.O. Box 16515, Tallahassee, FL 32317 this 11th day of June, 2007.

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

Charmaine M. Millsaps
Attorney for the State of Florida